

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of)	MB Docket No. 08-214
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7709-P
Complainant)	
v.)	
)	
Time Warner Cable Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7822-P
Complainant)	
v.)	
)	
Bright House Networks, LLC,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7829-P
Complainant)	
v.)	
)	
Cox Communications, Inc.,)	
Defendant)	
)	
Herring Broadcasting, Inc. d/b/a WealthTV,)	File No. CSR-7907-P
Complainant)	
v.)	
)	
Comcast Corporation,)	
Defendant)	

**DEFENDANTS' JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF
LAW**

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Defendants Time Warner Cable Inc. (“TWC”), Comcast Corporation (“Comcast”), Cox Communications, Inc. (“Cox”) and Bright House Networks, L.L.C. (“BHN”) (collectively, the “Defendants”) submit the following joint Proposed Findings of Fact and Conclusions of Law in the above-captioned program carriage complaint proceeding by Complainant Herring Broadcasting, Inc. d/b/a WealthTV (“Herring Broadcasting” or “WealthTV”).

I. SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. WealthTV contends that each Defendant discriminated against it in violation of Section 76.1301(c) of the Commission’s rules by denying carriage on the basis of each Defendant’s affiliation with the MOJO programming network (formerly INHD). WealthTV further asserts that the alleged discrimination has restrained it from competing fairly in the marketplace. It seeks an order compelling each Defendant to provide guaranteed linear carriage to WealthTV on all of the Defendants’ systems that had previously carried MOJO, on terms and conditions it unilaterally proposes.

2. WealthTV, however, has failed to meet its burden of demonstrating through admissible evidence that any such discrimination occurred. It has not introduced any direct evidence that Defendants discriminated against WealthTV to protect MOJO. To the contrary, each Defendant offered unrebutted testimony by its responsible programming executives demonstrating that carriage decisions concerning WealthTV had nothing whatsoever to do with MOJO or WealthTV’s status as a non-affiliated network. Although in pretrial submissions WealthTV claimed that iN DEMAND Networks, L.L.C. (“iN DEMAND”) copied WealthTV in transitioning INHD to MOJO, testimony from iN DEMAND’s senior programming executive showed that no such thing occurred.

3. Nor did WealthTV establish an evidentiary basis upon which the Presiding Judge could draw an inference of discrimination. Each Defendant showed through testimony supported by contemporaneous documentary evidence that carriage decisions concerning WealthTV resulted from legitimate, good faith business judgment. Although each of the Defendants reached its decision for somewhat different reasons, generally each concluded that it would not use its limited bandwidth to carry WealthTV, an early stage network with little brand appeal that charged high subscriber fees and did not provide sufficiently compelling programming to attract new, or retain existing subscribers. WealthTV adduced no evidence to support even an inference, let alone a conclusion, that the Defendants did not act in good faith in their determinations of whether to carry WealthTV, or that such decisions had anything to do with affiliation.

4. To the contrary, the marketplace evidence showed that many other multichannel video programming distributors (“MVPDs”) not affiliated with iN DEMAND reached the same conclusion as Defendants concerning WealthTV. Eighteen of the 25 largest MVPDs (including the two largest Direct Broadcast Satellite (“DBS”) operators, DirecTV and Dish Network), most of which are not affiliated with MOJO, determined not to carry WealthTV. The decisions made by these MVPDs provide strong corroborative proof that Defendants based their carriage decisions on business judgment rather than affiliation and point out the absurdity of WealthTV’s claim that Defendants would have entered into carriage agreements with WealthTV had only they not been acting to protect MOJO.

5. WealthTV’s attempt to show substantial similarity between its network and MOJO suffered from a similar failure of proof. In order to shoehorn its case into the proper framework, WealthTV unsuccessfully “reinvented” itself for this proceeding as a network

targeting 25- to 49-year-old men, the demographic essentially targeted by MOJO. But WealthTV's proof consisted merely of several self-selected, male-skewed screen shots and snippets of programming that even its principal, Charles Herring, acknowledged to be unrepresentative of WealthTV's overall programming. Although WealthTV offered expert testimony of Sandra McGovern to support its substantial similarity claim, cross-examination revealed that she had based her opinion (at least that part of her opinion that she did not seek to withdraw) on a selective review of WealthTV's programming chosen for her by Mr. Herring from among only those small number of the network's shows designed to appeal to a male audience. Given her concession that she did not view 23 of the 29 shows identified by WealthTV as its featured programming, her opinion is entitled to no weight. Documentary evidence produced out of WealthTV's files further undermine its claim that it targeted a male audience. Other than one presentation slide used in several presentations in 2004, virtually all of WealthTV's affiliation agreements, communications, marketing materials and website pages consistently and uniformly described WealthTV as a network with "broad appeal" targeted to men and women of all ages interested in how wealth is achieved and enjoyed. Mr. Herring's prior sworn testimony in another matter is to the same effect. This evidence makes it impossible to conclude that WealthTV targeted the same male audience as MOJO, and its volume casts substantial doubt on the credibility of WealthTV in urging the Presiding Judge to do so.

6. WealthTV's claim of substantial similarity is also rebutted by the testimony of Defendants' programming expert, Michael Egan. Mr. Egan conducted a comprehensive quantitative and qualitative study of WealthTV and MOJO that led him to conclude that neither the programming nor target audiences of the two networks are substantially similar. Mr. Egan's study showed that the predominant categories of programming on MOJO

(sports, movies, music and reality) are different than those emphasized on WealthTV (travel & recreation, lifestyle, food & drink and art, design & collectibles), which in turn overlapped far more closely with the Fine Living network than with MOJO. Nor did Mr. Egan find the edgy and irreverent “look and feel” of MOJO to be anything like the calmer and mature WealthTV.

7. The record also reveals that WealthTV has not been unfairly restrained from competing in the marketplace. WealthTV contends that each Defendant’s conduct has prevented it from obtaining the 20 million subscribers it claims it needs to attract national advertisers to remain viable. There is no evidentiary basis for attaching any significance to that threshold figure, and WealthTV’s advertising expert could not deny the relative success of networks with fewer than 20 million subscribers. Even if the 20 million threshold had any currency, Defendants’ respective decisions not to affiliate with WealthTV are not an impediment to the network reaching that number. There are more than 50 million MVPD subscribers not served by Defendants, including more than 30 million on the DBS networks DirecTV and Dish Network alone. And unlike other start-up networks, WealthTV has secured carriage on dozens of MVPDs, and has steadily grown. Finally, many new avenues for programmers are emerging, including the proliferation of new business models for Video on Demand (“VOD”) and Internet distribution. No conduct by any of the Defendants has restrained WealthTV from successfully competing on any of these fronts.

8. For all of these reasons, the Presiding Judge’s recommended decision should conclude that Defendants have not violated Section 76.1301(c) because WealthTV has not carried its burden of proving either that Defendants discriminated on the basis of affiliation or that Defendants’ actions have unreasonably restrained WealthTV’s ability to compete in the MVPD marketplace. As a result, there is no need to consider any proposed remedy. It bears

mention nonetheless that, as with respect to liability, WealthTV has failed to discharge its burden on remedy. The carriage sought by WealthTV — full linear carriage over a term of 10 years at WealthTV’s suggested rates, with no drop rights or Most Favored Nations (“MFN”) provision — is inconsistent with the terms that WealthTV has accepted in the marketplace. The evidence shows that in lieu of linear carriage WealthTV has [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL] And even WealthTV’s own expert acknowledged her expectation that large MVPDs would receive MFNs in any deal with WealthTV. Accordingly, any order of carriage must correspond to a realistic contract that WealthTV could have secured in the marketplace, not the punitive terms sought by WealthTV in this proceeding.

9. We set forth below Defendants’ specific joint Proposed Findings of Fact and Conclusions of Law.

PROPOSED FINDINGS OF FACT

II. PARTIES AND IN DEMAND RELATIONSHIP

A. Identification Of The Parties

10. Complainant Herring Broadcasting operates WealthTV, a linear programming network that provides a high definition (“HD”) feed, a simulcast standard definition (“SD”) feed, and VOD packages.¹

¹ WTV Ex. 144, Herring Dir. Test. at 1-2. For the Presiding Judge’s convenience, citations to Hearing Exhibits will be denoted by “[Party] Ex. ____,” and references to the Hearing Transcript will be denoted by “Hearing Tr. [page:line (Witness)].”

11. Defendants Comcast, TWC, Cox, and BHN are cable television multiple system operators (“MSOs”) that serve approximately 24 million, 14 million, 5.4 million, and 2.4 million customers, respectively, of the approximately 97.7 million pay video subscribers in the United States.²

B. Identification Of Affiliated Programming Relevant To Complainant’s Allegations

12. The Defendants own iN DEMAND, which, among other things, operated a linear HD cable programming channel between 2003 and 2008 known as INHD from its inception in 2003 and later as MOJO when it was renamed in 2007.³ The channel was discontinued in December of 2008.⁴

13. Comcast, TWC, Cox, and BHN (referred to in places as the “Owners”) own approximately 51%, 32%, 12% and five percent, respectively, of iN DEMAND.⁵ One representative each from Comcast, TWC and Cox serves on the iN DEMAND Board of Directors.⁶

² See TWC Ex. 75; Cox Ex. 44, Ordover Expert Report ¶ 9.

³ Cox Ex. 84, Asch Dir. Test. ¶¶ 18-19, 55. iN DEMAND launched two companion linear HD channels simultaneously in 2003: INHD and INHD2. INHD2 ceased operations in 2006.

⁴ *Id.* ¶ 91.

⁵ Hearing Tr. 3934:15-17 (Witmer), 4656:18-20 (Bond), 4874:11-15 (Wilson); Cox Ex. 79, Wilson Direct Test. ¶ 19; BHN Ex. 9, Miron Direct Test. ¶ 3.

⁶ See, e.g., Cox Ex. 79, Wilson Dir. Test. ¶¶ 19, 22; Hearing Tr. 4330:13-21, 4331:18-20, 4333:19-4334:4 (Asch), 4874:8-20 (Wilson).

III. LIKE MANY EARLY STAGE NETWORKS, WEALTHTV HAS FACED MANY BUSINESS OBSTACLES TO GAINING CARRIAGE

A. WealthTV Was Formed As A Start-up Network With Inexperienced Management

14. Herring Broadcasting launched WealthTV, a national cable network, on June 1, 2004.⁷ The principals of Herring Broadcasting included Robert Herring and his son, Charles Herring. Neither had any experience in running a cable network before launching WealthTV.⁸

15. Herring Broadcasting launched WealthTV as a 24/7 HD network airing programming that featured fine dining and wine, luxury transportation, philanthropy, travel, insights on culture and other high-end lifestyle programming.⁹ As described by the President of WealthTV, Charles Herring, WealthTV's programming focuses on how wealth is achieved, used and enjoyed.¹⁰ Prior to its launch and since the network's inception, Herring Broadcasting marketed WealthTV to MVPDs, advertisers and consumers as featuring high-end programming "with a broad appeal."¹¹

⁷ WTV Ex. 144, Herring Dir. Test. at 1.

⁸ *See id.* at 3-4.

⁹ *Id.* at 9.

¹⁰ *Id.*

¹¹ **[BEGIN HIGHLY CONFIDENTIAL]**



16. The operations of WealthTV have been self-funded by the Herring family. There is no evidence that any other third party has made any financial investment in WealthTV.¹²

17. WealthTV initially hired an affiliate sales team headed by a seasoned cable industry veteran to assist it in gaining carriage on MVPDs.¹³ Disputes between WealthTV management and its sales force soon arose, leading to employee turnover and litigation with the chief affiliate salesperson.¹⁴ Much of the marketing effort to MVPDs was thereafter handled by Charles Herring.¹⁵

B. Programming Networks Vigorously Compete For Carriage

18. WealthTV, like all cable programming networks, faces strong competition for carriage on MVPDs.¹⁶ A fundamental challenge for programming networks is that there are more programming networks than there is available bandwidth capacity to carry them.¹⁷ For example, according to the National Cable & Telecommunications Association, there are 565 cable programming networks all competing for relatively scarce real estate on MVPD platforms.¹⁸

[REDACTED] [END]
HIGHLY CONFIDENTIAL

¹² WTV Ex. 144, Herring Dir. Test. at 6.

¹³ *Id.* at 5.

¹⁴ Hearing Tr. 3048:7-20, 3393:21-3395:8, 3430:18-3432:16 (Herring).

¹⁵ *See, e.g., id.* at 2873:19-2874:7 (Herring).

¹⁶ TWC Ex. 86, Homonoff Dir. Test. ¶ 9; Hearing Tr. 4830:10-4832:3 (Homonoff), 3395:14-3397:4 (Herring).

¹⁷ TWC Ex. 86, Homonoff Dir. Test. ¶ 10; Hearing Tr. 4796:11-16 (Homonoff).

¹⁸ TWC Ex. 86, Homonoff Dir. Test. ¶ 10; *see also* TWC Ex. 15.

19. Virtually all new and established programming networks prefer a broad carriage commitment from an MVPD but often do not achieve this goal. Instead, many new networks enter into “hunting licenses” with cable operators that establish the terms and conditions for carriage but do not create any obligation for the cable operator to carry the network. Because of this intense competition for carriage, including via hunting licenses, many start-up networks fail to gain any carriage at all.¹⁹

20. Cable operators consider a number of factors when they make network carriage decisions based on their business and editorial judgment.²⁰

21. For example, as Charles Herring acknowledged at trial, technical bandwidth constraints are a significant limiting factor affecting MVPDs’ decisions regarding which networks they can carry.²¹ Although there have been technological advances such as “switched digital technology” that have improved some MVPDs’ bandwidth capacity, those improvements have not eliminated the bandwidth constraints facing MVPDs.²² Cable operators must allocate their finite bandwidth capacity to both video and non-video services, such as high-speed Internet and telephone services.²³ They continue to carry many channels in both digital and analog due to FCC regulations and because a significant percentage of the cable television

¹⁹ TWC Ex. 86, Homonoff Dir. Test. ¶ 11.

²⁰ *Id.* ¶¶ 19-24; Hearing Tr. 4796:17-4798:10 (Homonoff). *See also* Proposed Findings of Fact at ¶¶ 38-48, 101-12, 142-59, *infra*.

²¹ Hearing Tr. 3273:11-3274:13 (Herring); TWC Ex. 86, Homonoff Dir. Test. ¶¶ 14-17.

²² TWC Ex. 86, Homonoff Dir. Test. ¶ 13; Hearing Tr. 4846:10-4848:18 (Homonoff); *see also* Hearing Tr. 4030:9-4031:13 (Witmer), 4613:5-4614:14 (Bond).

²³ TWC Ex. 86, Homonoff Dir. Test. ¶ 14.

subscriber base has not yet adopted digital cable.²⁴ Furthermore, among the channels MVPDs do carry, broadcast networks (ABC, NBC, CBS and FOX) and numerous cable networks (*e.g.*, ESPN, USA, MTV and Fox News) continue to provide much of the most highly-rated and desirable programming on television, prompting MVPDs to devote bandwidth to those services that further constrains an MVPD's bandwidth availability for unknown networks.²⁵ Finally, the proliferation of HD channels has also affected available capacity because HD channels require significantly more bandwidth than SD channels, even in a digital environment.²⁶

22. MVPDs also consider network programming content to be of critical importance when making carriage decisions. Programming decisions are closely linked to the programming's impact on an MVPD's subscriber base and customer satisfaction. An MVPD carefully assesses the composition of its overall programming lineup to determine the desirability of adding (or subtracting) a particular channel, and the impact of the channel on its ability to win or maintain subscribers and to enhance its profitability.²⁷ This is true of HD programming as well. HD feeds of existing and popular networks are also commonly offered at no additional cost, and thus are even more attractive to MVPDs than unproven HD networks that may seek significant fees.²⁸

²⁴ *Id.*

²⁵ *Id.* ¶ 15.

²⁶ *Id.* ¶ 17; *see also* TWC Ex. 82, Carter Dir. Test. ¶ 6; Comcast Ex. 3, Bond Dir. Test. ¶ 5; Cox Ex. 79, Wilson Dir. Test. ¶¶ 44, 82.

²⁷ TWC Ex. 86, Homonoff Dir. Test. ¶¶ 18, 20; Hearing Tr. 4834:4-21 (Homonoff); *see also* Hearing Tr. 3979:8-3980:16 (Witmer).

²⁸ TWC Ex. 86, Homonoff Dir. Test. ¶ 18; Comcast Ex. 3, Bond Dir. Test. ¶ 8; TWC Ex. 81, Witmer Dir. Test. ¶ 21; Cox Ex. 79, Wilson Dir. Test. ¶¶ 40-41.

23. If a network has already been launched, it can demonstrate to a prospective MVPD the appeal of its content by providing information on the network's track record of distribution, and empirical data such as Nielsen ratings data. Nielsen ratings are available with respect to individualized markets, even if a network does not yet have a national Nielsen rating. Such information can aid a network in convincing MVPDs that the network's addition to the lineup would add compelling content for subscribers.²⁹

24. In making carriage decisions, MVPDs also take into account wholesale programming costs — that is, the price it will cost the MVPD to carry the network.³⁰ The cost of acquiring programming is likely the most significant non-capital expenditure for an MVPD, and a critical factor in determining the distributor's bottom line.³¹

25. MVPDs also typically consider the track record of a network's ownership or management team. A new network launched by a company that previously and successfully has operated cable programming networks will have a greater likelihood of long-term success.³² Moreover, the experience of a network's management team affects how a network's finances are spent, what programming is created/acquired, the level of talent attracted to a network, and how the entire operation executes on the network's strategic plan.³³

²⁹ Hearing Tr. 4838:17-4842:15 (Homonoff).

³⁰ TWC Ex. 86, Homonoff Dir. Test. ¶ 22; Comcast Ex. 3, Bond Dir. Test. ¶¶ 5, 8; Hearing Tr. 5008:3-5009:15 (Wilson).

³¹ TWC Ex. 86, Homonoff Dir. Test. ¶ 22.

³² *Id.* ¶ 24.

³³ *Id.*

26. Faced with this competitive marketplace, WealthTV has sought carriage from all major MVPDs, including the Defendants and other MVPDs around the country. The evidence reveals that, like many early stage networks, WealthTV has had difficulty securing any carriage from many MVPDs, and has only obtained [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED] [END HIGHLY CONFIDENTIAL] WealthTV has been successful in securing carriage on Verizon FiOS and AT&T U-verse systems, as well as many smaller cable operators.

C. Many MVPDs Have Not Agreed To Carry WealthTV

27. None of the Defendants has agreed to carry WealthTV on a full 24/7 linear basis.³⁴ WealthTV has asserted that each Defendant's failure to conclude carriage agreements with the network can be attributed solely to its affiliation with iN DEMAND and MOJO.³⁵ The marketplace evidence, however, is that Defendants' respective decisions concerning WealthTV are consistent with those of many other MVPDs that have elected not to carry WealthTV notwithstanding their lack of affiliation with iN DEMAND and irrespective of whether they carried MOJO.³⁶

28. Eighteen of the 25 largest MVPDs in the country have chosen not to carry WealthTV notwithstanding the fact that most are not affiliated with iN DEMAND or MOJO. For example, over the years, WealthTV has tried and failed to get carriage on DirecTV, the second largest MVPD, with more than 17 million subscribers. DirecTV is not affiliated with iN

³⁴ Hearing Tr. 3258:3-16, 3289:12-17 (Herring).

³⁵ *Herring Broad., Inc. v. Time Warner Cable*, Carriage Agreement Compl. ¶ 1.

³⁶ Hearing Tr. 3030:22-3031:13 (Herring).

DEMAND or MOJO. WealthTV has also tried and failed to secure carriage on Dish Network,³⁷ Cablevision,³⁸ Mediacom,³⁹ Suddenlink,⁴⁰ Cable One,⁴¹ Atlantic Broadband,⁴² Armstrong,⁴³ Knology,⁴⁴ Midcontinent Communications,⁴⁵ Blue Ridge Communications⁴⁶ and Broadstripe,⁴⁷ all MVPDs unaffiliated with iN DEMAND or MOJO.

D. Of The MVPDs That Carry WealthTV, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

29. Of the MVPDs that have entered into affiliation agreements with WealthTV, [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED]

30. [REDACTED]
[REDACTED]
[REDACTED]⁴⁸

³⁷ *Id.* at 3252:16-17, 3255:18-3258:2 (Herring); TWC Ex. 75.

³⁸ Hearing Tr. 3278:11-3279:1 (Herring); TWC Ex. 75.

³⁹ Hearing Tr. 3290:14-21 (Herring); TWC Ex. 75.

⁴⁰ Hearing Tr. 3290:22-3291:16 (Herring); TWC Ex. 75.

⁴¹ Hearing Tr. 32921-10 (Herring); TWC Ex. 75.

⁴² Hearing Tr. 3295:7-12 (Herring); TWC Ex. 75.

⁴³ Hearing Tr. 3295:13-21 (Herring); TWC Ex. 75.

⁴⁴ Hearing Tr. 3302:8-16 (Herring); TWC Ex. 75.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]⁴⁹

31. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁰ [REDACTED]

[REDACTED]

[REDACTED]⁵¹ [REDACTED]

[REDACTED]⁵²

32. [REDACTED]

[REDACTED]

[REDACTED]⁵³ [REDACTED]

[REDACTED]⁵⁴ [REDACTED]

[REDACTED]

[REDACTED]⁵⁵ [END HIGHLY

CONFIDENTIAL]

49 [REDACTED]

50 [REDACTED]

51 [REDACTED]

52 [REDACTED]

53 [REDACTED]

54 [REDACTED]

55 [REDACTED] [END HIGHLY CONFIDENTIAL]

33. WealthTV's track record in the marketplace is powerful evidence that its failure to secure carriage is based upon the merits of its network and the legitimate business considerations exercised by MVPDs around the country. Nonetheless, WealthTV contends that the Defendants' comparable decisions to deny it full linear carriage are instead based upon their respective affiliation with iN DEMAND and MOJO. As detailed in the following Section IV, WealthTV fails to meet its burden of showing any actionable discrimination by any Defendant on the basis of affiliation.

IV. WEALTHTV HAS NOT PROVEN THAT ANY OF THE DEFENDANTS DISCRIMINATED AGAINST IT ON THE BASIS OF AFFILIATION

A. TWC Did Not Discriminate Against WealthTV On The Basis Of Affiliation Or Non-Affiliation

34. Since its inception in 2004, WealthTV has sought carriage on TWC. Between 2004 and the filing of this action in late 2007, TWC engaged in regular, open and good faith communications with WealthTV. The evidence demonstrates that TWC's decision not to provide full linear carriage to WealthTV had nothing to do with MOJO or iN DEMAND; rather, in the period before INHD was re-branded as MOJO, TWC simply considered WealthTV to be a low priority because it neither provided fundamentally important programming nor fit within TWC's specific strategy for HD programming, which centered on obtaining HD versions of popular, branded programming networks that TWC knew its subscribers wanted to watch.

35. Moreover, unlike many other MVPDs, TWC actually signed an agreement with WealthTV for VOD carriage on its San Antonio system, and ultimately offered WealthTV a nationwide hunting license for both linear and VOD carriage. WealthTV, however, refused to renew its VOD agreement with TWC, rejected the hunting license and determined to litigate rather than enter into a marketplace agreement.

(a) WealthTV has not presented any evidence that TWC has discriminated against it on the basis of affiliation

36. Each TWC witness who testified at trial unqualifiedly denied that TWC's ownership interest in iN DEMAND and MOJO had any impact on TWC's consideration of WealthTV.⁵⁶ For example, Melinda Witmer, TWC's Chief Programming Officer since 2007, testified that TWC's consideration of WealthTV was "absolutely not" impacted by TWC's affiliation with MOJO.⁵⁷ Mickey Carter, TWC's former Senior Director of Programming, dealt directly with WealthTV for three years between 2005-07, and also confirmed that consideration of WealthTV had nothing to do at all with TWC's affiliation with INHD/MOJO.⁵⁸ WealthTV's lack of affiliation with TWC similarly played no role in TWC's consideration of WealthTV for carriage.⁵⁹

37. WealthTV's allegations, moreover, run headlong into the indisputable proof that TWC relies heavily upon non-affiliated networks for its programming lineup. During the 2004-08 period in which WealthTV sought carriage, TWC launched almost 60 new channels, only three of which were affiliated with TWC. Such unaffiliated channels included Toon Disney, The Sportsman Channel, ESPN Deportes, MGM HD, Hallmark Movie Channel, Military History Channel, and Discovery Familia.⁶⁰ In the last year, TWC has continued to sign

⁵⁶ TWC Ex. 81, Witmer Dir. Test. ¶¶ 25, 33; TWC Ex. 84, Rosenberg Dir. Test. ¶ 7; Hearing Tr. 3951:9-3952:5 (Witmer), 4097:21-4098:3 (Carter), 4193:11-16 (Goldberg), 4236:16-19 (Rosenberg).

⁵⁷ Hearing Tr. 3951:9-3952:5 (Witmer).

⁵⁸ *Id.* at 4097:21-4098:3 (Carter).

⁵⁹ TWC Ex. 81, Witmer Dir. Test. ¶ 25, 33; Hearing Tr. 4098:4-8 (Carter).

⁶⁰ TWC Ex. 56; TWC Ex. 81, Witmer Dir. Test. ¶ 10; TWC Ex. 85, Egan Dir. Test. ¶ 31; Hearing Tr. 3920:14-3933:8 (Witmer).

on non-affiliated channels such as Chiller, Smithsonian HD, MAV TV and RFD TV.⁶¹ TWC also provided initial or expanded carriage to a number of unaffiliated, male-oriented channels such as ESPNU, Speed and Military Channel that were far more similar in content and look and feel to MOJO than was WealthTV.⁶² These undisputed facts are inconsistent with WealthTV's claims that TWC favored affiliated networks and made carriage decisions to protect MOJO.

(b) TWC's carriage decisions are based upon programming experience, editorial discretion and sound business judgment

38. The evidence reflects that in making its carriage decisions TWC is committed to providing the best programming options for its customers.⁶³ Although it meets with many new and fledgling networks seeking to gain carriage on its systems, TWC rigorously scrutinizes each network, only a fraction of which TWC decides to carry.⁶⁴ The number of networks far exceeds TWC's capacity to carry all of them.⁶⁵ Accordingly, new networks have to meet a high threshold in order to secure carriage on TWC systems.⁶⁶

39. TWC relies upon its executives' industry experience, editorial judgment and a wide variety of other factors in making carriage decisions. There is no empirical formula and no one factor is determinative.⁶⁷

⁶¹ Hearing Tr. 3921:12-3925:11 (Witmer).

⁶² TWC Ex. 85, Egan Dir. Test. ¶¶ 32-34.

⁶³ TWC Ex. 81, Witmer Dir. Test. ¶ 4.

⁶⁴ *Id.*; see also Hearing Tr. 3912:15-19 (Witmer).

⁶⁵ Hearing Tr. 3912:15-3913:3 (Witmer).

⁶⁶ TWC Ex. 82, Carter Dir. Test. ¶ 3; Hearing Tr. 3978:21-3979:3 (Witmer).

⁶⁷ TWC Ex. 81, Witmer Dir. Test. ¶ 5.

40. In all cases, TWC assesses whether the content of the programming will be appealing to its customers and has the potential to “move the needle” in terms of viewership, either in the form of attracting subscribers to TWC or discouraging the defection of existing subscribers to a competitor if TWC did not carry the channel.⁶⁸ TWC views this programming from the perspective of the customer and tries to determine whether the programming will bring something to its customers that it is not otherwise delivering.⁶⁹

41. TWC also typically relies on research, empirical data and other information provided to it by the network in order to assess consumer appeal. In conjunction with any objective data, TWC programming executives also rely on their collective experience to evaluate the network’s programming goals, its talent, the production quality and its overall look and feel.⁷⁰

42. Evaluating the financial and business strength of networks is also an important component of the carriage decision. Among other things, TWC looks at the programming experience of management, the depth of the executive team, the financial backing necessary to promote the network, the business model employed and a network’s track record.⁷¹

43. TWC considers whether the network is carried by its competitors, principally DirecTV and Dish Network, with which it competes throughout its geographic footprint. Carriage on a competitor is not in and of itself sufficient to gain carriage on TWC and TWC does not seek to duplicate the carriage of its competitors. However, TWC evaluates

⁶⁸ *Id.* ¶ 6; Hearing Tr. 3913:4-3914:1, 3915:20-3916:4 (Witmer).

⁶⁹ Hearing Tr. 3913:4-3914:1 (Witmer).

⁷⁰ TWC Ex. 81, Witmer Dir. Test. ¶ 8; Hearing Tr. 3914:2-3915:9 (Witmer).

⁷¹ TWC Ex. 81, Witmer Dir. Test. ¶¶ 9-11; Hearing Tr. 3914:2-3915:9 (Witmer).

carriage on competitors to determine whether it will lose subscribers to those competitors that carry a network that TWC does not.⁷²

44. All of these decisions are made within the context of TWC's technological and business constraints. TWC has limited bandwidth. Technological advancements such as "switched digital" have not eliminated the bandwidth constraints imposed upon TWC.⁷³ Nor does TWC have an unlimited budget for new programming; it consistently must assess whether the cost of the programming it carries provides the best value to TWC and its customers.⁷⁴ TWC's programming group must balance these considerations in order to provide the right mix of programming to its customers at the right price.⁷⁵

45. Additional considerations come into play when deciding whether to carry HD programming. Because HD programming generally uses approximately six times as much bandwidth as SD programming, TWC lacks the bandwidth to carry all available HD networks.⁷⁶ By the 2005-06 time frame, TWC understood from its consumer research that its customers' HD preferences centered on HD versions of their favorite, well-established networks.⁷⁷ TWC concluded that "[b]rand names [consumers] love are more important to customers than unique or exclusive HD programming."⁷⁸

⁷² TWC Ex. 81, Witmer Dir. Test. ¶¶ 12-13; Hearing Tr. 3915:10-3918:1 (Witmer).

⁷³ TWC Ex. 81, Witmer Dir. Test. ¶¶ 4, 17, 23; Hearing Tr. 4030:9-4031:13 (Witmer); TWC Ex. 86, Homonoff Dir. Test. ¶¶ 13-17.

⁷⁴ TWC Ex. 81, Witmer Dir. Test. ¶¶ 4-5.

⁷⁵ Hearing Tr. 4028:8-4029:5 (Witmer).

⁷⁶ TWC Ex. 81, Witmer Dir. Test. ¶ 17, 23.

⁷⁷ *Id.*; TWC Ex. 82, Carter Dir. Test. ¶ 5; TWC Ex. 17 at 17-3, 17-4; TWC Ex. 21 at 21-2, 21-8.

⁷⁸ TWC Ex. 21 at 21-2.

46. TWC therefore focused its HD strategy on obtaining HD versions of popular networks that it already carried rather than new stand-alone HD channels. The strategy is summarized in a March 2006 programming strategy deck: “[w]henever possible, we should seek to add ‘brand name’ vs. niche HD channels.”⁷⁹ In 2007 presentations and e-mails to its executive vice-presidents, TWC detailed its plan to roll out branded and popular HD versions of such networks as Sci Fi, USA Network, Bravo and Speed, as well as other HD offerings from Fox, Discovery Channel, Disney/ESPN and other programmers with channels already carried by TWC in SD format.⁸⁰ TWC viewed the carriage of these HD feeds as critical to maintaining its competitive posture with DBS operators that had touted the number of HD networks they carried.⁸¹

47. TWC also set up a tiered structure for its HD programming. Because it did not want to charge its customers extra simply for providing a technological improvement, in most cases TWC negotiated for networks to provide their HD feeds at no additional cost. TWC placed those HD networks for which it made no additional payments on a free HD tier.⁸²

48. TWC placed those HD networks that charged separate affiliate fees for their HD feed on a Pay HD Tier offered to subscribers at an additional fee to offset the cost of carriage.⁸³ The networks on that tier have included HD Net and HD Net Movies, Universal HD,

⁷⁹ TWC Ex. 17 at 17-6; TWC Ex. 81, Witmer Dir. Test. ¶ 17; TWC Ex. 82, Carter Dir. Test. ¶ 6; Hearing Tr. 4096:14-4097:8 (Carter).

⁸⁰ TWC Ex. 42; TWC Ex. 50 at 50-6; TWC Ex. 81, Witmer Dir. Test. ¶ 19; *see also* TWC Ex. 31 (TWC HD Counterpart Services Launched (June 2007 – November 2008)).

⁸¹ TWC Ex. 81, Witmer Dir. Test. ¶ 19.

⁸² TWC Ex. 81, Witmer Dir. Test. ¶¶ 20-21; Hearing Tr. 3946:8-3947:22 (Witmer).

⁸³ Hearing Tr. 3946:8-3949:8 (Witmer).

MGM HD, Hallmark Movies HD, Smithsonian HD, MAV TV and until December 2008, MOJO (formerly INHD). TWC is not affiliated with any of these channels other than MOJO.⁸⁴ As a network that intended to charge TWC for its HD feed (after an introductory free period), WealthTV competed for a slot on TWC's Pay HD tier.⁸⁵

(c) WealthTV did not provide TWC with a compelling or strategic value proposition and thus was assigned a low priority

49. Between 2005 and March 2007, Mickey Carter, a Senior Director of Programming, served as the primary contact between TWC and WealthTV. During his tenure, Mr. Carter had numerous meetings and communications with WealthTV in which the network sought to gain carriage on TWC systems.⁸⁶ TWC's consideration of WealthTV in this period necessarily had nothing to do with MOJO, since the re-branding of INHD into MOJO did not occur until May 2007.⁸⁷

50. Based on his assessment of WealthTV's programming and appeal, Mr. Carter reached the judgment that WealthTV would not "move the needle" for TWC; that is, would neither help TWC attract new customers nor help retain existing ones. Although WealthTV highlighted its HD programming, that programming did not fit into TWC's strategy of securing agreements with well-branded and popular channels. WealthTV also did not offer sports, movies or other fare viewed by TWC as fundamentally important programming.⁸⁸ In Mr.

⁸⁴ *Id.* at 3946:8-3949:9 (Witmer).

⁸⁵ TWC Ex. 81, Witmer Dir. Test. ¶ 25.

⁸⁶ TWC Ex. 82, Carter Dir. Test. ¶¶ 7-9; Hearing Tr. 4095:3-6 (Carter).

⁸⁷ Cox Ex. 84, Asch Dir. Test. ¶ 55.

⁸⁸ TWC Ex. 82, Carter Dir. Test. ¶ 8.

Carter's view, WealthTV comprised a lifestyle channel with narrow appeal that catered to the wealthy and those who aspired to be wealthy. WealthTV did not provide him with any research or empirical data to demonstrate otherwise. Finally, he was aware that WealthTV was not carried by TWC's primary DBS competitors.⁸⁹

51. Mr. Carter also considered the level of interest in WealthTV from TWC's systems spread around the country. WealthTV made many visits to TWC systems and often claimed to Mr. Carter that TWC system management had expressed substantial interest in WealthTV. In 2005, WealthTV sent Mr. Carter a chart claiming to summarize the strong interest of TWC systems in carrying WealthTV.⁹⁰ But the chart on its face showed uneven interest in WealthTV. Even those systems that supposedly had an interest in carrying the network had bandwidth and other concerns that posed impediments to carriage of WealthTV. Notably, many of the largest systems, such as New York, had informed WealthTV that launch would not be imminent.⁹¹

52. At WealthTV's urging, during his tenure Mr. Carter contacted approximately 10 systems.⁹² Mr. Carter's inquiries led him to conclude that WealthTV had been inflating the level of interest in WealthTV and that there was no groundswell of support.⁹³ Prior to his departure from TWC in March 2007, Mr. Carter reported to his corporate programming

⁸⁹ *Id.*, ¶¶ 7, 9, 11; Hearing Tr. 4095:7-4097:8, 4158:4-4162:19, 4170:4-4171:18 (Carter).

⁹⁰ TWC Ex. 8; TWC Ex. 82, Carter Dir. Test. ¶ 9.

⁹¹ *Id.*; Hearing Tr. 3318:14-3323:17 (Herring).

⁹² Hearing Tr. 4146:4-4147:7 (Carter).

⁹³ TWC Ex. 82, Carter Dir. Test. ¶ 9; Hearing Tr. 4113:9-4115:11, 4144:6-4147:13 (Carter).

colleagues that “the feedback I have received from most divisions is that this content is not compelling enough to make it a launch priority . . . the feedback on WealthTV was lukewarm.”⁹⁴

53. Notwithstanding WealthTV’s claim to the contrary, Mr. Carter never made a promise of carriage to the network.⁹⁵ Mr. Carter did not have the authority to make such a commitment on behalf of TWC.⁹⁶ WealthTV’s own documents in fact rebut the claim that Mr. Carter made any commitment. An e-mail from September 2006 discloses that, rather than making a carriage commitment, Mr. Carter told Charles Herring that WealthTV had a narrow focus and paled in importance compared to other networks for which TWC had “immediate needs.” Mr. Carter refused to speculate as to when an agreement could be reached.⁹⁷ Mr. Carter did not foreclose the possibility of carriage, but he viewed WealthTV to be a low priority.⁹⁸ When pressed during cross-examination, Mr. Herring acknowledged that he understood after this meeting that TWC had legitimate business reasons for not carrying WealthTV.⁹⁹

(d) WealthTV ends the San Antonio VOD trial with TWC

54. In late 2006 and early 2007, TWC’s San Antonio system expressed interest in possible carriage of WealthTV. TWC’s corporate programming group authorized the San Antonio system to conduct a pilot trial of WealthTV’s HD VOD content over a six-month

⁹⁴ TWC Ex. 29; TWC Ex. 82, Carter Dir. Test. ¶ 10; Hearing Tr. 4101:3-4102:18 (Carter).

⁹⁵ TWC Ex. 82, Carter Dir. Test. ¶ 10; Hearing Tr. 4097:12-20 (Carter).

⁹⁶ Hearing Tr. 4140:11-4141:3 (Carter).

⁹⁷ TWC Ex. 134; Hearing Tr. 3327:9-3332:5 (Herring).

⁹⁸ TWC Ex. 82, Carter Dir. Test. ¶ 11; TWC Ex. 24; Hearing Tr. 4149:6-4150:9, 4151:11-4154:4 (Carter).

⁹⁹ Hearing Tr. 3333:1-3334:13 (Herring).

period in 2007. TWC and WealthTV entered into an agreement in February 2007 pursuant to which WealthTV would provide 20 hours of VOD programming to the San Antonio system on a monthly basis.¹⁰⁰ The VOD trial began on March 1, 2007,¹⁰¹ permitting TWC to evaluate the appeal of WealthTV's content.¹⁰²

55. On May 7, 2007, just weeks after the beginning of the San Antonio trial, WealthTV sent TWC a pre-filing notice of this proceeding.¹⁰³ One month later, WealthTV notified TWC that it did not want to renew the VOD agreement.¹⁰⁴ TWC sought to renew the pilot, but WealthTV declined, ending the pilot in the summer of 2007.¹⁰⁵

(e) WealthTV rejects TWC's offer of a hunting license

56. WealthTV and TWC representatives met on July 18, 2007 to explore whether any agreement on carriage could be reached. During that meeting, WealthTV informed TWC that it sought immediate carriage on several of TWC's largest systems, including New York, Los Angeles and Texas.¹⁰⁶ Charles Herring also claimed that numerous systems had expressed interest in WealthTV.¹⁰⁷ In response, as TWC Vice President of Programming Andrew Rosenberg testified, TWC requested market research or consumer data to demonstrate

¹⁰⁰ TWC Ex. 26; TWC Ex. 83, Goldberg Dir. Test. ¶ 4.

¹⁰¹ TWC Ex. 25; TWC Ex. 83, Goldberg Dir. Test. ¶ 5.

¹⁰² Hearing Tr. 4197:21-4200:12 (Goldberg).

¹⁰³ TWC Ex. 79.

¹⁰⁴ TWC Ex. 32; TWC Ex. 83, Goldberg Dir. Test. ¶ 6.

¹⁰⁵ TWC Ex. 83, Goldberg Dir. Test. ¶ 7; Hearing Tr. 3358:12-15 (Herring).

¹⁰⁶ TWC Ex. 84, Rosenberg Dir. Test. ¶ 12.

¹⁰⁷ *Id.*

WealthTV's programming value, information that prospective networks typically provide to TWC. WealthTV did not provide that information at the July 18 meeting or any time thereafter.¹⁰⁸

57. After this meeting, Mr. Rosenberg and Eric Goldberg, who had replaced Mickey Carter as TWC's contact with WealthTV, contacted the various executives at TWC's systems around the country represented by Mr. Herring to be interested in carriage of the network. Mr. Rosenberg and Mr. Goldberg testified to their conversations with Greg DiPaolo in the Midwest Region, David Gray in the Northeast Region, Paul Braun of the National Division, Jeff Henry in Texas and others in New York City and elsewhere. Contrary to Mr. Herring's assertions, their inquiries uncovered little enthusiasm for WealthTV, particularly at the rates that WealthTV intended to charge.¹⁰⁹ Once again, WealthTV had conveyed to TWC senior management an inflated level of field interest that did not withstand scrutiny.

58. On July 19, 2007, WealthTV sent a proposed term sheet to TWC.¹¹⁰ That prompted a negotiation between Charles Herring and Eric Goldberg that centered on TWC's grant of a "hunting license" to WealthTV.¹¹¹

59. TWC regularly negotiates hunting licenses with newer and start-up networks which it is interested in carrying, and has entered into many hunting licenses since 2004.¹¹² Such a license is beneficial to TWC because it enables TWC to avoid having to make a

¹⁰⁸ *Id.* ¶ 11.

¹⁰⁹ TWC Ex. 83, Goldberg Dir. Test. ¶ 11; TWC Ex. 84, Rosenberg Dir. Test. ¶ 12; Hearing Tr. 4225:14-4226:5, 4228:21-4231:7 (Rosenberg).

¹¹⁰ TWC Ex. 35.

¹¹¹ TWC Ex. 83, Goldberg Dir. Test. ¶ 13; TWC Ex. 37.

¹¹² TWC Ex. 84, Rosenberg Dir. Test. ¶¶ 16-18; TWC Ex. 70.

broad commitment to carry a relatively untested network nationwide, while permitting individual systems to choose to carry the network in areas where there is strong appeal.¹¹³ TWC hunting licenses have proven very beneficial for many networks. Networks such as [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]¹¹⁴ [END HIGHLY CONFIDENTIAL]

60. On August 7, 2007, Charles Herring sent Eric Goldberg a term sheet that provided for a hunting license with respect to TWC’s linear carriage of WealthTV, an MFN, and guaranteed national carriage of WealthTV’s VOD service.¹¹⁵ The parties exchanged comments on the term sheet and had additional discussions throughout August, with TWC pressing for “drop rights,” that is, the right to delete the network at TWC’s discretion.¹¹⁶ WealthTV agreed to extend the hunting license to both linear and VOD services, but resisted granting drop rights to TWC, even though WealthTV had been engaged in parallel negotiations with another MVPD, Cablevision, in which it had proposed the very drop rights that it declined to give to TWC.¹¹⁷

61. TWC regularly obtained drop rights in the hunting licenses that it negotiated, and Mr. Goldberg and Mr. Rosenberg considered it to be a standard provision in any

¹¹³ TWC Ex. 84, Rosenberg Dir. Test. ¶ 16. *See also* TWC Ex. 86, Homonoff Dir. Test. ¶ 27.

¹¹⁴ *See* TWC Ex. 86, Homonoff Dir. Test. ¶¶ 29-30.

¹¹⁵ TWC Ex. 39; TWC Ex. 83, Goldberg Dir. Test. ¶ 15; Hearing Tr. 3360:2-3361:9, 3362:9-3363:17 (Herring).

¹¹⁶ TWC Ex. 83, Goldberg Dir. Test. ¶ 15; TWC Ex. 44; TWC Ex. 45; TWC Ex. 46.

¹¹⁷ TWC Ex. 83, Goldberg Dir. Test. ¶ 15; Hearing Tr. 3363:8-13 (Herring).

deal with a relatively new network.¹¹⁸ In fact, as Mr. Rosenberg pointed out in an e-mail to Mr. Goldberg, affording TWC drop rights would actually benefit WealthTV because it would be difficult for WealthTV to convince TWC systems to carry WealthTV without this protection.¹¹⁹ Accordingly, Mr. Goldberg informed Mr. Herring that TWC would not agree to a deal without drop rights.¹²⁰

62. On September 6, 2007, Mr. Herring sent Mr. Goldberg another revised term sheet.¹²¹ This term sheet provided for a hunting license for both linear and VOD carriage, as well as full drop rights for TWC, an MFN, and a term of five years.¹²² Furthermore, Mr. Herring initialed and signed the term sheet, and he confirmed in his testimony that this term sheet “reflected the terms upon which [WealthTV was] prepared to enter into an affiliation agreement” with TWC.¹²³ This version of the term sheet, however, also contained a provision that the HD VOD service would only be free to TWC upon the linear launch of WealthTV on one TWC system.¹²⁴

63. After evaluating the term sheet, Mr. Goldberg sent back a revised term sheet to Mr. Herring on October 31, 2007. TWC made two changes to the WealthTV draft: first,

¹¹⁸ TWC Ex. 83, Goldberg Dir. Test. ¶ 16; TWC Ex. 84, Rosenberg Dir. Test. ¶¶ 19-21.

¹¹⁹ TWC Ex. 47; TWC Ex. 83, Goldberg Dir. Test. ¶¶ 17-19; TWC Ex. 84, Rosenberg Dir. Test. ¶¶ 19-21.

¹²⁰ TWC Ex. 83, Goldberg Dir. Test. ¶¶ 19, 21.

¹²¹ *Id.*; TWC Ex. 48.

¹²² *Id.*

¹²³ *Id.*; Hearing Tr. 3366:6-11 (Herring).

¹²⁴ TWC Ex. 83, Goldberg Dir. Test. ¶¶ 21-22.

it eliminated the condition of a linear launch before receiving free HD VOD and, second, it granted TWC the right to offer the service on an *a la carte* (i.e., subscriber by subscriber) basis.¹²⁵ Mr. Herring rejected the TWC proposal the same day he received it.¹²⁶

64. On December 3, 2007, Mr. Goldberg again called Mr. Herring, a conversation testified to by both Mr. Goldberg and Mr. Rosenberg, but omitted from Mr. Herring's account.¹²⁷ In this conversation, Mr. Goldberg reported the "good news" that TWC had decided to withdraw the October 31 counter-proposals and accept the terms offered by WealthTV in its signed September 6 term sheet.¹²⁸ TWC stood prepared to finalize a contract based upon a hunting license for linear and VOD service, drop rights and a condition that it would not receive free VOD service until WealthTV had been launched on at least one TWC system — precisely the terms previously deemed acceptable by WealthTV.¹²⁹ Inexplicably, Mr. Herring turned down his own deal.¹³⁰

65. TWC made one last effort to work out a deal with WealthTV, offering in lieu of a hunting license an agreement guaranteeing WealthTV linear carriage on the San Antonio system.¹³¹ WealthTV rejected this offer as well.¹³²

¹²⁵ TWC Ex. 52; TWC Ex. 83, Goldberg Dir. Test. ¶ 22.

¹²⁶ TWC Ex. 53; TWC Ex. 83, Goldberg Dir. Test. ¶ 22.

¹²⁷ Hearing Tr. 3379:1-11 (Herring).

¹²⁸ TWC Ex. 83, Goldberg Dir. Test. ¶ 23; TWC Ex. 84, Rosenberg Dir. Test. ¶ 26; Hearing Tr. 4191:5-4192:1 (Goldberg).

¹²⁹ *Id.*

¹³⁰ *Id.* at 4192:5-9 (Goldberg), 3381:17-22 (Herring); TWC Ex. 83, Goldberg Dir. Test. ¶ 23.

¹³¹ TWC Ex. 83, Goldberg Dir. Test. ¶ 23; TWC Ex. 84, Rosenberg Dir. Test. ¶ 26.

¹³² TWC Ex. 83, Goldberg Dir. Test. ¶ 24; TWC Ex. 84, Rosenberg Dir. Test. ¶ 27.

66. In sum, throughout its course of dealings with WealthTV, TWC acted in good faith and in accordance with sound business and editorial judgments that were not affected in any way by iN DEMAND or MOJO. TWC carefully scrutinizes all new networks that seek carriage and considers a wide variety of factors in making carriage decisions. Here, WealthTV did not offer important content for TWC's customers, did not fit within TWC's HD strategy of securing HD feeds of branded, well-known networks, did not generate much enthusiasm in TWC's individual systems, and because of its substantial fees was limited to competing for space on TWC's Pay HD Tier. Nonetheless, as there was some interest in San Antonio, TWC entered into a VOD agreement and offered to agree to the hunting license arrangement that WealthTV itself proposed. WealthTV chose to reject those relationships. Its claim of discrimination against TWC is groundless.

B. Comcast Did Not Discriminate Against WealthTV On The Basis Of Affiliation Or Non-Affiliation

67. The evidence adduced at the hearing demonstrates that Comcast did not discriminate against WealthTV on the basis of affiliation or non-affiliation. Comcast has provided the un rebutted testimony of two of its programming executives that Comcast's consideration of WealthTV was not affected in any way by Comcast's affiliation with MOJO or WealthTV's lack of affiliation with Comcast. In fact, Comcast added numerous non-affiliated networks during the same period that WealthTV was seeking carriage. Moreover, Comcast had no incentive to discriminate against WealthTV to favor MOJO; at the very time WealthTV claims that Comcast was discriminating against it in order to favor MOJO, Comcast was actively attempting to shut down MOJO and reclaim the bandwidth for other uses.

68. Comcast's discussions with WealthTV were in good faith and not discriminatory. Indeed, Comcast made two good faith, non-discriminatory offers to carry

WealthTV, which were [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL] It was
WealthTV — not Comcast — that declined to pursue either of these offers and continued to
press for a guarantee of extensive carriage across Comcast’s systems for both its SD and HD
feeds, for a long term, and with high license fees. The evidence at trial demonstrated that
Comcast had several legitimate business reasons for not agreeing to carry WealthTV on these
terms. In short, the parties’ inability to reach an agreement regarding carriage for WealthTV
stems from differences regarding the terms and conditions of carriage, including license fees,
which, in turn, stemmed from *good faith* disagreements during the negotiation process.

**(a) Comcast programming executives affirm that Comcast’s
consideration of WealthTV was not affected by MOJO or
WealthTV’s lack of affiliation**

69. Comcast’s programming executives confirm that Comcast’s ownership
interest in iN DEMAND and MOJO had no impact on Comcast’s consideration of WealthTV.
Madison (Matt) Bond, Executive Vice President for Content Acquisition for Comcast Cable
Communications, LLC (“Comcast Cable”), an indirect subsidiary of Comcast, is responsible for
negotiating program carriage arrangements for Comcast cable systems.¹³³ Beginning in 2004,
Mr. Bond was personally involved in discussions with WealthTV regarding potential carriage of
that network on Comcast’s cable systems.¹³⁴ Mr. Bond affirmed that Comcast’s ownership
interest in iN DEMAND and MOJO had no impact on Comcast’s consideration of WealthTV.¹³⁵

¹³³ Comcast Ex. 3, Bond Dir. Test. ¶ 1.

¹³⁴ *Id.* ¶¶ 6-7.

¹³⁵ *Id.* ¶¶ 16-20; Hearing Tr. 4561:9-14 (Bond).

70. Alan Dannenbaum, Executive Vice President of Network Distribution for Comcast Programming Management, LLC, an indirect subsidiary of Comcast, confirmed Mr. Bond's testimony. From January 2004 to July 2007, Mr. Dannenbaum held the position of Senior Vice President of Content Acquisition for Comcast Cable.¹³⁶ During that time, Mr. Dannenbaum reported to Mr. Bond and was responsible for negotiating programming agreements for Comcast cable systems.¹³⁷ Mr. Dannenbaum was personally involved in discussions with WealthTV regarding potential carriage of that network on Comcast's systems from 2004 until July 2007.¹³⁸ Mr. Dannenbaum affirmed that Comcast's ownership interest in iN DEMAND and MOJO had no impact on Comcast's consideration of WealthTV.¹³⁹

71. Charles Herring admitted that no one from Comcast ever told him that the decisions Comcast made with respect to WealthTV were tied to MOJO.¹⁴⁰

72. Mr. Bond and Mr. Dannenbaum also affirmed that the fact that WealthTV was not affiliated with Comcast played no role in Comcast's consideration of WealthTV.¹⁴¹

¹³⁶ Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 1.

¹³⁷ *Id.*

¹³⁸ *Id.* ¶¶ 3-4. Mr. Dannenbaum's responsibilities changed in July 2007 when he moved into his current position of Executive Vice President of Network Distribution for Comcast Programming Management, LLC, an indirect subsidiary of Comcast, and he had no further involvement in Comcast's carriage decisions relating to WealthTV. Hearing Tr. 4755:10-14 (Dannenbaum).

¹³⁹ Hearing Tr. 4755:3-9 (Dannenbaum).

¹⁴⁰ *Id.* at 3663:19-3664:5 (Herring).

¹⁴¹ Comcast Ex. 3, Bond Dir. Test. ¶¶ 5, 8-11; Comcast Ex. 8, Dannenbaum Dir. Test. ¶¶ 5-6; Hearing Tr. 4555:18-4556:12 (Bond), 4752:11-4753:7 (Dannenbaum).

(b) Comcast had no incentive to discriminate against WealthTV in order to favor MOJO

73. WealthTV's assertion that Comcast discriminated against WealthTV because of Comcast's affiliation with MOJO is simply not credible. The vast majority of programming networks that Comcast carries are not owned by Comcast.¹⁴² Moreover, during the time frame in which Comcast was discussing possible carriage with WealthTV, Comcast entered into carriage agreements with the owners of "well over 100 channels" unaffiliated with Comcast.¹⁴³ Those unaffiliated networks include Bloomberg, RFD-TV, Black Television News Channel, Discovery Channel, Animal Planet, The Learning Channel, ESPN and ESPN-2, Disney Channel, MSNBC, USA, Sci Fi, TCM, TNT and CNN.¹⁴⁴ Comcast also entered into carriage arrangements with approximately 60 unaffiliated ethnic programmers during this time period.¹⁴⁵

74. Furthermore, Comcast had no interest in protecting MOJO, but rather wanted to shut down MOJO to free up additional bandwidth for higher priority uses. Before the fall of 2007, Mr. Bond became concerned about the long-term viability of MOJO and began discussions within Comcast with regard to the network's future.¹⁴⁶ Mr. Bond was concerned about whether the cost model for MOJO was sustainable.¹⁴⁷ Ultimately, Mr. Bond was reluctant even to agree to iN DEMAND selling the network to a new owner because the contemplated sale

¹⁴² Comcast Ex. 3, Bond Dir. Test. ¶ 3.

¹⁴³ Hearing Tr. 4560:7-11 (Bond).

¹⁴⁴ *Id.* at 4560:17-22 (Bond); *see also* Comcast Ex. 3, Bond Dir. Test. ¶ 3.

¹⁴⁵ Hearing Tr. 4560:22-4561:8 (Bond). Mr. Dannenbaum confirmed that the vast majority of programming networks carried by Comcast are not affiliated with Comcast. Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 13.

¹⁴⁶ Comcast Ex. 3, Bond Dir. Test. ¶¶ 18-19.

¹⁴⁷ *Id.*; *see also* Comcast Ex. 6 at 2-3.

likely would include a continued obligation for Comcast to carry the network.¹⁴⁸ As Mr. Bond explained in a colloquy with the Presiding Judge, continued carriage of MOJO was undesirable because Comcast was trying to recapture the bandwidth to use for other premier, well-branded networks for competitive reasons.¹⁴⁹

75. Thus, during the very time WealthTV asserts that Comcast was discriminating against it to favor MOJO, Comcast was in fact trying to shut down MOJO for competitive reasons.

(c) Comcast's discussions with WealthTV were in good faith and were not discriminatory

(1) WealthTV approached Comcast in March 2004

76. In March 2004, prior to launching its network on June 1, 2004,¹⁵⁰ WealthTV approached Comcast to discuss possible carriage of WealthTV's programming on Comcast systems.¹⁵¹ Mr. Herring had a meeting with Jennifer Gaiski of Comcast on or around March 26, 2004.¹⁵² Mr. Herring and Ms. Donna Thomas, then WealthTV's head of affiliate sales, also had a meeting with Mr. Dannenbaum some time in March 2004.¹⁵³ The purpose of these meetings apparently was to provide Comcast with a general overview of WealthTV.¹⁵⁴

¹⁴⁸ Comcast Ex. 3, Bond Dir. Test. ¶¶ 18-19; *see also* Comcast Ex. 6 at 2-3.

¹⁴⁹ Hearing Tr. 4685:21-4688:3 (Bond).

¹⁵⁰ *Id.* at 2927:9 (Herring).

¹⁵¹ *See* WTV Ex. 220 (e-mail exchange between Ms. Thomas and Mr. Dannenbaum dated March 17, 2004 discussing a possible meeting the week of March 23, 2004).

¹⁵² Hearing Tr. 2906:16-2908:12 (Herring); WTV Ex. 117.

¹⁵³ Hearing Tr. 4758:1-3 (Dannenbaum).

¹⁵⁴ *Id.* at 2907:10-12 (Herring).

The tone of Mr. Herring's meeting with Mr. Dannenbaum was "professional" and Mr.

Dannenbaum seemed "to absorb the information" WealthTV presented to him.¹⁵⁵

77. After the March 2004 meeting, Mr. Dannenbaum checked with Comcast's divisional and corporate management to see whether there was any interest in pursuing a hunting license with WealthTV.¹⁵⁶ On March 26, 2004, Mr. Dannenbaum sent an e-mail to Page Thompson, Terry Bienstock, and Amy Banse of Comcast reporting on a meeting with WealthTV.¹⁵⁷ "The linear [WealthTV] channel ha[d] no appeal" to Mr. Dannenbaum.¹⁵⁸ WealthTV's proposed high-definition channel "ha[d] some appeal" for Mr. Dannenbaum, but he had reservations about whether Comcast would want to commence distributing it "since [Comcast] may want to reserve space for other potential HD channels that were being developed (Discovery HD, TNT HD, *etc.*)."¹⁵⁹ He was also uncertain about whether WealthTV "is differentiated from Fine Living (which of course, they maintain it is). . . ."¹⁶⁰

78. No one at Comcast had any interest in entering into a carriage agreement with WealthTV: "No one from Comcast — not anyone at the division level, at the system level, at the region level or corporate level — ever expressed any interest in launching WealthTV's service."¹⁶¹ Throughout the period 2004 to 2006, however, Mr. Dannenbaum had numerous

¹⁵⁵ *Id.* at 2919:20-2920:2 (Herring).

¹⁵⁶ Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 7.

¹⁵⁷ *Id.* ¶ 8.

¹⁵⁸ Comcast Ex. 9 at 1; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 8.

¹⁵⁹ Comcast Ex. 9 at 1.

¹⁶⁰ *Id.*

¹⁶¹ Hearing Tr. 4753:3-7 (Dannenbaum); *see also* Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 7.

telephone calls and meetings with WealthTV representatives, and continued to discuss the possibility of Comcast entering into a “hunting license” with WealthTV and the possibility of including WealthTV’s programming in Comcast’s VOD service.¹⁶²

79. Given Comcast’s low interest in carrying WealthTV, pursuing an agreement was not a priority, and Mr. Dannenbaum did not discuss or negotiate specific terms and conditions of service with WealthTV. In an e-mail exchange with Mr. John Ghiorzi of WealthTV from November 16 to November 30, 2005, Mr. Dannenbaum made it clear to Mr. Ghiorzi that Comcast was overwhelmingly busy and would be unable to provide a draft agreement to WealthTV.¹⁶³ Mr. Dannenbaum was even more explicit in an e-mail to Mr. Ghiorzi dated July 7, 2006:

Things have been extremely busy as always. I am willing to meet with you again to discuss any significant changes in what you have to offer, however I cannot agree that I indicated any positive interest in our previous meetings. As you know, I have told both you and Charles that I have not received any indication from anyone in the systems or divisions, nor here at corporate, that there is interest in launching your service. As an editorial judgment, at this time we do not see sufficient value to our customers in your programming. That said, if you want to set up a meeting at my office, I will ask Kelly to try to fit something into my schedule in the not too distant future.¹⁶⁴

(2) Mr. Dannenbaum met with Mr. Herring in July 2005

80. Mr. Herring had no personal dealings with Comcast between March 2004 and July 2005,¹⁶⁵ when he met again with Mr. Dannenbaum.¹⁶⁶ Mr. Herring testified that, during

¹⁶² Comcast Ex. 8, Dannenbaum Dir. Test. ¶¶ 3-4.

¹⁶³ WTV Ex. 230.

¹⁶⁴ Comcast Ex. 21.

¹⁶⁵ Hearing Tr. at 2939:9-2942:10 (Herring).

that meeting, Mr. Dannenbaum threatened to block the launch of WealthTV on Adelphia Communications Corporation (“Adelphia”) cable systems and alleged that Mr. Dannenbaum subsequently took steps to block Adelphia from launching WealthTV.¹⁶⁷ Mr. Herring’s testimony on this point, however, is entirely unsubstantiated, lacks credibility, and should be given no weight.

81. First, the record contains no contemporaneous documents supporting Mr. Herring’s claim.

82. Second, Mr. Dannenbaum does not recall making any such threat, and is “virtually 100 percent certain” he did not contact Adelphia officials concerning the possible carriage of WealthTV in 2005 or at any other time.¹⁶⁸ Mr. Dannenbaum also had no standing instruction or understanding with Adelphia that it would not make any channel changes in 2005 without prior approval from Comcast.¹⁶⁹

83. Third, Mr. Herring had no personal knowledge of any communications between Mr. Dannenbaum and Adelphia.¹⁷⁰ Mr. Herring also had no knowledge of whether Adelphia might have independent business reasons for not permitting WealthTV to be carried on Adelphia cable systems.¹⁷¹

¹⁶⁶ *Id.* at 2947:1-2948:11 (Herring); WTV Ex. 144, Herring Dir. Test. at 43; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 12.

¹⁶⁷ Hearing Tr. 2947:1-2948:11 (Herring); WTV Ex. 144, Herring Dir. Test. at 43.

¹⁶⁸ Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 12; Hearing Tr. 4754:9-4755:2, 4778:21-4782:17 (Dannenbaum).

¹⁶⁹ Hearing Tr. 4782:9-16 (Dannenbaum).

¹⁷⁰ *Id.* at 3639:5-17 (Herring).

¹⁷¹ *Id.* at 3639:19-3640:2 (Herring).

84. Mr. Herring's testimony is nothing more than a series of assumptions about the meaning of a meeting that occurred over three-and-one-half years ago. Mr. Herring's testimony about that meeting, however, should be given no weight because Mr. Herring's testimony has been shown to be fundamentally unreliable. For instance, Mr. Herring is relying on his memory of a conversation that allegedly took place in a meeting in 2005, but he did not even recall being deposed over the course of three days in late 2006 and early 2007 in the litigation between Ms. Donna Thomas, a former leader of his sales team, and WealthTV.¹⁷² While Mr. Herring reluctantly admitted that he had been deposed after being confronted with transcripts of the depositions, this does not speak well of the reliability of Mr. Herring's memory.¹⁷³ Further, Mr. Herring tried to sponsor a number of "call reports" prepared by WealthTV affiliate sales representatives as exhibits in this proceeding despite the fact that he had previously testified under oath that a number of the call reports may have been forged and may have reported meetings that never occurred.¹⁷⁴

85. As Mr. Herring's testimony is not credible, his unsubstantiated allegation that Mr. Dannenbaum prevented WealthTV from being carried on Adelphia systems should be accorded no weight. This is particularly the case since Mr. Herring's allegation has been directly rebutted by Mr. Dannenbaum himself.

¹⁷² *Id.* at 3048:18-3049:1 (Herring).

¹⁷³ *Id.* at 3049:15-3050:3 (Herring).

¹⁷⁴ *Id.* at 3494:12-20, 3497:1-3503:17, 3526:3-19 (Herring).

(3) Mr. Dannenbaum met with Mr. Herring in 2006

86. Mr. Herring met again with Mr. Dannenbaum in August 2006.¹⁷⁵ Mr. Herring alleges that Mr. Dannenbaum stated that Comcast had no interest in linear digital channels¹⁷⁶ and did not want to make another MTV on its back without owning it.¹⁷⁷ Mr. Herring, however, has no corroborating evidence that Mr. Dannenbaum ever made any such statement. Moreover, Mr. Dannenbaum denies making any such statement.¹⁷⁸ The Presiding Judge, therefore, should accord no weight to Mr. Herring's unsubstantiated allegation, particularly in light of Mr. Herring's general lack of credibility and reliability.¹⁷⁹

(4) Mr. Bond made two valuable offers of carriage to WealthTV

87. Starting in 2004 and continuing through subsequent meetings, Mr. Bond discussed with WealthTV the possibility of a hunting license and launching the network as part of Comcast's VOD service.¹⁸⁰ Mr. Bond explained that a launch on Comcast's VOD service would have provided WealthTV a way to prove the appeal of WealthTV's programming for Comcast viewers.¹⁸¹ Because Comcast has very good viewing data from VOD, Comcast would

¹⁷⁵ *Id.* at 2951:4-2952:4 (Herring); WTV Ex. 144, Herring Dir. Test. at 44; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 13.

¹⁷⁶ WTV Ex. 144, Herring Dir. Test. at 44. This is entirely consistent with the e-mail Mr. Dannenbaum sent to Mr. Ghiorzi a month earlier. *See supra* text at ¶ 79.

¹⁷⁷ WTV Ex. 144, Herring Dir. Test. at 44.

¹⁷⁸ Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 13 ("I never made this statement"); Hearing Tr. 4753:8-21 (Dannenbaum).

¹⁷⁹ *See Proposed Findings of Fact, supra*, at ¶ 84.

¹⁸⁰ Comcast Ex. 3, Bond Dir. Test. ¶¶ 6-11.

¹⁸¹ *Id.* ¶ 6.

be able track when customers watch (or even re-watch) a WealthTV program.¹⁸² WealthTV “categorically refused to pursue a VOD arrangement.”¹⁸³

88. In the month prior to WealthTV filing its program carriage complaint, Mr. Bond had a series of conversations with Mr. Herring in which Mr. Bond proposed two specific and valuable offers of carriage to WealthTV.¹⁸⁴ These negotiations resulted in part from an e-mail by Mr. Herring threatening to file a program carriage complaint against Comcast.¹⁸⁵ Mr. Bond was skeptical about the value of carrying WealthTV programming, but engaged with WealthTV in a good faith effort to “break through” and reach a deal to avoid the litigation threatened by WealthTV.¹⁸⁶

89. From the outset of these negotiations, WealthTV was pressing for a guarantee of extensive carriage across Comcast’s systems with high license fees. In a Term Sheet dated April 14, 2008, WealthTV was seeking a guarantee of carriage for its SD linear service on Comcast’s “most widely penetrated digital tier, . . . , such that at least 1 million digital Subscribers receive the service in at least four different DMAs.”¹⁸⁷ WealthTV was seeking identical carriage for its HD linear service as well.¹⁸⁸ The term of the agreement would be for

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* ¶¶ 12-15.

¹⁸⁵ Hearing Tr. 4716:20-4717:16 (Bond).

¹⁸⁶ *Id.* at 4717:22-4718:2, 4718:4-4719:5 (Bond).

¹⁸⁷ WTV Ex. 204 at 1.

¹⁸⁸ *Id.*

ten years with licensee fees to be paid beginning six months into the term of the agreement.¹⁸⁹

The license fees would start at \$0.08 per subscriber for the SD Linear Service and \$0.14 per subscriber for the HD Linear service and would increase by 10 percent per year every year thereafter.¹⁹⁰ This would total approximately \$25 million dollars over the life of the agreement.¹⁹¹

90. WealthTV's demands for extensive carriage over a ten-year term with such high license fees were non-starters for Mr. Bond.¹⁹² Therefore, in a conversation with Mr. Herring on April 14, 2008, Mr. Bond proposed the possibility of a hunting license that would enable WealthTV to seek carriage directly from individual Comcast systems, but would not obligate Comcast to provide carriage on any particular Comcast system.

91. Mr. Herring rejected this proposal and continued to press for a long-term guarantee of carriage, claiming that WealthTV had "earned" a broad commitment of carriage from Comcast because WealthTV had secured distribution with the telephone companies.¹⁹³ Mr. Bond disagreed: "I don't think getting that distribution indicated to me that he had earned a broad carriage commitment. . . . [T]he fact that he had gained distribution . . . on the telephone

¹⁸⁹ *Id.* at 4.

¹⁹⁰ *Id.* While the term sheet included an initial free period for 2007-2008, given the April 2008 date of the rate card, the free term would have only been a matter of months by the time of launch. Hearing Tr. 4728:4-21 (Bond).

¹⁹¹ The \$0.08 SD subscriber fee would total over \$9.1 million (\$0.08 x 1,000,000 subscribers x 12 months x 9.5 years) and the \$0.14 HD subscriber fee would total over \$15.9 million (\$0.14 x 1,000,000 subscribers x 12 months x 10 years).

¹⁹² Comcast Ex. 3, Bond Dir. Test. ¶ 8 ("WealthTV's price structure alone was a non-starter for me.").

¹⁹³ *Id.* ¶ 12; Hearing Tr. 4725:4-4726:17 (Bond).

companies was significant, but also significant was that he had not gained distribution on the satellite platforms or other cable companies.”¹⁹⁴

92. It bears emphasis that Mr. Herring omitted from his written testimony the fact that he rejected this offer and made no counter offer. Mr. Herring ultimately admitted this fact only when compelled to under cross-examination.¹⁹⁵

93. Mr. Herring continued to press for a guarantee of extensive carriage across Comcast’s systems with high license fees. On April 17, 2008, Mr. Bond made a second proposal, offering to: (1) launch WealthTV on the most highly penetrated digital tier on one of Comcast’s large cable systems in Chicago, South Florida, or Atlanta for a guaranteed period of time; (2) pay a per-subscriber license fee for such carriage; and (3) include WealthTV’s programming in Comcast’s VOD service.¹⁹⁶ Mr. Herring rejected this carriage option as well, and countered with a proposal to launch WealthTV in the San Francisco Bay Area or Houston.¹⁹⁷ Mr. Bond responded that the Bay Area was not a viable option because of channel capacity constraints, and that Houston appeared to offer a less promising demographic makeup for WealthTV than Chicago, South Florida, or Atlanta.¹⁹⁸

94. In a follow-up telephone conversation with Mr. Herring on Friday, April 18, 2008, Mr. Bond reiterated that Comcast was prepared to negotiate a deal along the lines proposed. Indeed, Mr. Bond told Mr. Herring that he believed a deal could be reached prior to

¹⁹⁴ *Id.*

¹⁹⁵ Hearing Tr. 3619:14-3620:8 (Herring).

¹⁹⁶ Comcast Ex. 3, Bond Dir. Test. ¶ 13; Hearing Tr. 4558:10-4560:1 (Bond).

¹⁹⁷ Comcast Ex. 3, Bond Dir. Test. ¶ 14.

¹⁹⁸ *Id.*

the date by which WealthTV believed (because of the statute of limitations) that it had to file its program carriage complaint, *i.e.*, May 3, 2008.¹⁹⁹ Mr. Bond explained that the parties had more than two weeks to reach a deal, and that he was willing to work on a deal up until the deadline under the FCC’s rules to file a complaint or to toll the statute of limitations to give the parties additional time to negotiate.²⁰⁰ Mr. Bond was willing to enable further negotiations in this way “because . . . if there was a deal to be done, if we could work out a business arrangement, where he could get some distribution and, you know, show the performance of his content, and have a structure of carriage, then I wanted to actually get that done as opposed to being in litigation over it.”²⁰¹

95. Rather than pursue this carriage proposal and take up Mr. Bond’s offer to launch WealthTV and allow WealthTV a concrete and valuable opportunity to demonstrate its appeal, WealthTV abruptly cut off negotiations with Comcast and chose to sue rather than continue to negotiate.²⁰² As Mr. Bond testified, “I was having discussions with Mr. Herring. He had told me that he was going to check with his lawyer and then basically I didn’t hear from him again and they filed the litigation.”²⁰³

96. Again, it bears emphasis that Mr. Herring omitted from his written testimony the fact that it was WealthTV — not Comcast — that terminated the negotiations. Only when compelled to on cross-examination did Mr. Herring acknowledge that Comcast was

¹⁹⁹ *Id.* ¶ 15; Hearing Tr. 4559:5-4560:1 (Bond).

²⁰⁰ Comcast Ex. 3, Bond Dir. Test. ¶ 15; Hearing Tr. 4736:5-9 (Bond).

²⁰¹ Hearing Tr. 4727:12-19 (Bond).

²⁰² Comcast Ex. 3, Bond Dir. Test. ¶¶ 4, 15.

²⁰³ Hearing Tr. 4559:19-4560:1 (Bond).

willing to continue negotiating and that it was WealthTV that walked away from the negotiations.²⁰⁴

(d) Comcast's offers of carriage were reasonable and comparable to offers WealthTV has accepted from other MVPDs

97. The two offers of carriage that Comcast made to WealthTV in April 2008 were reasonable and not discriminatory. Indeed, TWC's expert witness, Howard Homonoff, demonstrated that hunting licenses are highly valuable agreements, affording newer networks an opportunity to secure a foothold within a system that can lead to enhanced exposure and additional carriage over time.²⁰⁵ There are numerous examples of programming networks that have used a hunting license successfully to develop broader distribution over time, such as The Sportsman Channel, Gospel Music Channel, and Hallmark Channel.²⁰⁶

98. More to the point, Comcast's carriage offers were comparable to the terms WealthTV has agreed to with other distributors that are not affiliated with iN DEMAND.

[BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED].²⁰⁷ [REDACTED]
[REDACTED]

²⁰⁴ *Id.* at 3623:15-3624:5, 3627:2-17 (Herring).

²⁰⁵ TWC Ex. 86, Homonoff Dir. Test. ¶¶ 27-28.

²⁰⁶ *Id.* ¶¶ 30-33.

²⁰⁷ **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[END HIGHLY CONFIDENTIAL]

[REDACTED]

[REDACTED]

[REDACTED]²⁰⁸

99.

[REDACTED]

[REDACTED]²⁰⁹ [END HIGHLY CONFIDENTIAL]

Mr. Herring also acknowledged that WealthTV itself proposed a hunting license to TWC in 2006 and again in 2007, which included an MFN and drop rights, and conceded that WealthTV had offered hunting licenses to other operators.²¹⁰

100. Mr. Herring also acknowledged that WealthTV signed an agreement that provided VOD to TWC's San Antonio system without any express promise of linear carriage.²¹¹

**(e) Comcast's decision not to carry WealthTV on the terms
WealthTV was seeking was a legitimate business decision**

101. Comcast's decision not to carry WealthTV on the terms WealthTV was demanding was not discriminatory, but was based on a sound and reasonable business judgment that WealthTV's programming did not represent a compelling value proposition to Comcast or its subscribers. This judgment took into account WealthTV's unproven and undifferentiated

²⁰⁸ *Id.*

²⁰⁹ [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]

[END HIGHLY CONFIDENTIAL]

²¹⁰ *Id.* at 3335:2-9, 3361:10-15, 3366:6-22 (Herring); *see also* TWC Ex. 48.

²¹¹ Hearing Tr. 3344:13-3345:7 (Herring).

programming content, the limits on Comcast’s channel capacity at the time, and WealthTV’s unrealistic carriage demands and price structure.

(1) WealthTV lacked compelling content

102. One of the primary concerns underlying Comcast’s program carriage decisions, particularly when dealing with a new or unproven network, is the content, and whether the channel represents a compelling idea: “[W]hat’s really first and foremost is really what’s the channel. You know, is it a good idea? Can they execute on it?”²¹² In this case, Comcast did not view WealthTV’s programming as a compelling value proposition for Comcast or its subscribers.²¹³ Mr. Bond was skeptical that WealthTV’s programming had significant audience appeal,²¹⁴ and WealthTV provided nothing to Mr. Bond demonstrating the audience appeal of its programming. Furthermore, WealthTV did not adduce evidence of audience appeal in the hearing.

103. Moreover, Mr. Bond was concerned that WealthTV was not associated with a proven, successful brand such as Fox or ESPN that Comcast might be compelled to carry in order to retain existing subscribers who might switch to other MVPDs if the system did not carry that programming.²¹⁵ In addition, WealthTV did not serve a unique or niche audience that

²¹² *Id.* at 4714:1-4 (Bond).

²¹³ *See* Comcast Ex. 3, Bond Dir. Test. ¶ 8.

²¹⁴ Hearing Tr. 4727:21-4728:3 (Bond).

²¹⁵ Comcast Ex. 3, Bond Dir. Test. ¶ 9.

would potentially allow Comcast to attract new or under-served subscribers to its service.²¹⁶ Mr. Dannenbaum had similar concerns regarding WealthTV's programming.²¹⁷

104. Thus, Comcast would be more interested in launching a network that might serve a unique or niche audience than a general entertainment network targeting a broad audience such as WealthTV.²¹⁸

105. Mr. Dannenbaum expressed his concerns directly to WealthTV: "As an editorial judgment, at this time we do not see sufficient value to our customers in your programming."²¹⁹ In addition, Mr. Dannenbaum had longstanding concerns about whether WealthTV's programming was sufficiently differentiated from other existing, poor-performing networks.²²⁰

(2) Carrying WealthTV would have required an unwarranted commitment of bandwidth

106. Comcast did not agree to carry WealthTV on the terms it was seeking for reasons related to Comcast's bandwidth constraints. Bandwidth on any cable system is necessarily finite.²²¹ "There are many networks vying for carriage on Comcast, and Comcast

²¹⁶ *Id.*

²¹⁷ Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5; Hearing Tr. 4773:6-4774:12 (Dannenbaum).

²¹⁸ Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5.

²¹⁹ Comcast Ex. 21.

²²⁰ *See* Comcast Ex. 9 at 1.

²²¹ Comcast Ex. 3, Bond Dir. Test. ¶ 5; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5.

cannot agree to carry them all.”²²² Consequently, cable companies must set priorities and cannot carry every new programming network that desires carriage.²²³

107. WealthTV’s demand for HD carriage greatly exacerbated the problem with regard to carriage on Comcast. The bandwidth requirements for carrying HD programming are roughly the equivalent of five SD channels.²²⁴ Comcast has not implemented switched digital technology and, although it is taking other steps to increase available bandwidth, its systems are still constrained.²²⁵ In Comcast’s judgment, WealthTV’s content did not warrant making such a significant commitment of bandwidth.²²⁶

(3) WealthTV’s demands for carriage and cost structure were unrealistic

108. Comcast did not agree to carry WealthTV on the terms it was seeking because WealthTV’s unrealistic demands for a long-term guarantee of broad carriage across Comcast systems for both its SD and its HD fees at a high license fee that would increase over term of the carriage agreement. As discussed above, WealthTV was demanding license fees starting at \$0.08 per subscriber for the SD linear service and \$0.14 per subscriber for the HD linear service that would increase by 10 percent per year every year thereafter.²²⁷ Moreover, although WealthTV had made various offers of free carriage for an initial term ranging

²²² Comcast Ex. 3, Bond Dir. Test. ¶ 5.

²²³ *Id.*; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5; TWC Ex. 86, Homonoff Dir. Test. ¶¶ 10-11.

²²⁴ Comcast Ex. 3, Bond Dir. Test. ¶ 5.

²²⁵ Hearing Tr. 4613:9-4614:22 (Bond).

²²⁶ Comcast Ex. 3, Bond Dir. Test. ¶ 5; Comcast Ex. 8, Dannenbaum Dir. Test. ¶ 5.

²²⁷ See Proposed Findings of Fact, *supra*, at ¶ 89.

somewhere between six months and two years, Mr. Bond’s fundamental concern was with “the way in which the fees and the costs accelerated very rapidly over time,” once the license fees came into effect.²²⁸

109. WealthTV’s license fee structure was particularly problematic given the fact that many other networks, particularly start-ups, seek much lower license fees and even established networks typically have provided their HD services at no additional charge. Moreover, WealthTV’s HD license fee was much higher than that Comcast pays for many established networks.²²⁹ Considering WealthTV’s unproven appeal, “WealthTV’s price structure alone was a non-starter.”²³⁰

(4) WealthTV lacked experience and third-party financial backing

110. Comcast also did not agree to carry WealthTV on the terms it was seeking because WealthTV’s owners and managers had no track record of producing quality television shows and did not appear to have third-party financial backing.²³¹ Taken in isolation, a network’s lack of experience or the lack of outside financing would not necessarily disqualify a network from being carried on Comcast, but these issues do raise concerns and risks about the network’s viability over the long run.²³²

²²⁸ Hearing Tr. 4644:13-20 (Bond).

²²⁹ Comcast Ex. 3, Bond Dir. Test. ¶ 8.

²³⁰ *Id.*; Hearing Tr. 4556:5-12 (Bond).

²³¹ Comcast Ex. 3, Bond Dir. Test. at ¶ 10; Comcast Ex. 8, Dannenbaum Dir. Test. at ¶ 6.

²³² Hearing Tr. 4713:14-4714:6, 4714:21-4718:3 (Bond).

111. The lack of third-party financing raises similar “execution risk[s].”²³³ The lack of apparent outside investors is a particular concern for Comcast in an era when distributing and producing national programming can cost upwards of \$100 million.²³⁴

(5) Expert witness testimony confirms the reasonableness of Comcast’s decision not to carry WealthTV on the terms it was seeking

112. Industry expert Howard Homonoff confirms that MVPDs typically evaluate and balance a number of factors in assessing programming proposals, weighing all aspects of the proposed network “according to their editorial and business judgments.”²³⁵ In this regard, MVPDs consider a network’s programming content,²³⁶ bandwidth constraints,²³⁷ the price of carriage,²³⁸ and the track record of a network’s ownership and/or management team.²³⁹

C. Cox Did Not Discriminate Against WealthTV On The Basis Of Affiliation Or Non-Affiliation

113. Cox did not discriminate against WealthTV on the basis of affiliation. Bob Wilson, the head of Cox’s corporate programming department, testified without contradiction that Cox’s decision not to carry WealthTV was based on legitimate business considerations and was not affected by Cox’s affiliation with INHD/MOJO or with WealthTV’s

²³³ *Id.* at 4715:17-4716:1 (Bond).

²³⁴ Comcast Ex. 3, Bond Dir. Test. ¶ 10; Hearing Tr. 4715:17-4716:7 (Bond).

²³⁵ TWC Ex. 86, Homonoff Dir. Test. ¶ 19.

²³⁶ *Id.* ¶ 20.

²³⁷ *Id.* ¶¶ 10-17.

²³⁸ *Id.* ¶¶ 22-23.

²³⁹ *Id.* ¶ 24.

lack of affiliation with Cox. Cox launched dozens of unaffiliated networks during the period that WealthTV was seeking carriage.

114. In considering whether to carry WealthTV, Cox applied the same legitimate business criteria that it applied when it considered carriage of other networks, and WealthTV failed to satisfy those criteria. Carriage of WealthTV would have been inconsistent with Cox's strategic plans, because WealthTV lacked appeal and value to Cox's customers. Cox found WealthTV to be a marginal network without an established audience or brand, without any experience in the industry or track record of developing successful programming, and without a realistic business plan .

115. Cox never considered INHD/MOJO when deciding whether to carry WealthTV and did not "favor" INHD/MOJO over WealthTV. Cox carried INHD, which was later re-branded as MOJO, well before WealthTV ever launched or contacted Cox to seek carriage. The business proposition INHD/MOJO presented for Cox was to provide a temporary solution for the immediate competitive need for an HD platform, and when the business need for MOJO ceased to exist, Cox took steps to terminate MOJO.

116. Cox also had no incentive to discriminate against WealthTV in favor of INHD/MOJO. Cox's fractional interest in iN DEMAND was too small to provide an incentive for Cox to benefit INHD/MOJO over WealthTV, and Cox did not have the ability to disadvantage WealthTV in the marketplace for programming or advertising.

(a) Cox's business and overall programming strategy

117. Cox is an MVPD that provides a wide range of advanced digital video, high-speed Internet and telephony services.²⁴⁰ Although Cox is the third largest cable MSO, it

²⁴⁰ Cox Ex. 79, Wilson Dir. Test. ¶ 6.

serves only about 5.4 million of the approximately 97.7 million total number of video subscribers in the United States.²⁴¹ Cox has systems in 26 markets across the country.²⁴²

118. Nationwide, Cox is a distant fifth to the top four MVPDs (two MSOs and two DBS providers), the smallest of which is more than double the size of Cox, which is significant because it means Cox has far less negotiating leverage to obtain favorable carriage terms from programmers, which give the best terms to operators with the most subscribers.²⁴³

119. In all of its markets, Cox competes vigorously for video customers with two DBS providers: DirecTV (17.2 million subscribers) and Echostar's Dish Network (13.7 million subscribers).²⁴⁴ Each DBS provider is individually larger than all other MVPDs except Comcast.²⁴⁵ In 11 of Cox's 26 systems, Cox also competes directly for video subscribers with traditional telephone companies, U-verse (AT&T) and FiOS (Verizon).²⁴⁶ Competition from these providers has been increasing rapidly as they deploy fiber-optic networks capable of delivering robust video offerings, and each of these competitors provides a full schedule of video programming services.²⁴⁷

120. Cox's programming strategy always has focused on delivering the maximum value to its subscribers, by offering them the services they want at competitive,

²⁴¹ *Id.* ¶ 7.

²⁴² *Id.*; Hearing Tr. 4863:16-18 (Wilson).

²⁴³ *See* TWC Ex. 75; *see also* Cox Ex. 79, Wilson Dir. Test. ¶¶ 7, 8.

²⁴⁴ Cox Ex. 79, Wilson Dir. Test. ¶ 8.

²⁴⁵ *Id.*

²⁴⁶ *Id.* ¶ 9.

²⁴⁷ *Id.*

affordable prices.²⁴⁸ Executing this strategy requires Cox to keep its programming costs as low as possible and to focus on providing the services subscribers really want, rather than adding marginal channels that are unlikely to attract a wide viewership.²⁴⁹

121. Cox has centralized its programming decisions in its corporate programming department in Atlanta, which is headed by Bob Wilson.²⁵⁰ Mr. Wilson is responsible for the strategic direction and oversight of programming content across all Cox cable systems.²⁵¹ If a network wishes to be carried on any Cox system, it must negotiate a carriage deal with Cox's corporate programming department.²⁵² Mr. Wilson has the final say on all of those deals.²⁵³

122. This unified strategy allows Cox to maximize its negotiating leverage with programming networks, often minimizing programming rates by guaranteeing launches to all or most Cox subscribers.²⁵⁴ It also allows Cox to maximize the appeal of its programming across its systems, and ensure that its systems are using their limited bandwidth to carry programming their customers demand.²⁵⁵

²⁴⁸ *Id.* ¶¶ 10, 16, 18.

²⁴⁹ *Id.* ¶ 18.

²⁵⁰ *Id.* ¶¶ 2-3.

²⁵¹ *Id.* ¶ 3.

²⁵² *Id.* ¶ 5; Hearing Tr. 5077:3-8 (Wilson), 5305:5-14 (Brennan).

²⁵³ Cox Ex. 79, Wilson Dir. Test. ¶ 5; Hearing Tr. 4858:15-4859:3 (Wilson).

²⁵⁴ Cox Ex. 79, Wilson Dir. Test. ¶ 16.

²⁵⁵ *Id.*; Hearing Tr. 4863:1-4863:1 (Wilson).

123. Cox's corporate programming department considers input from local systems in making programming decisions, but that input is only likely to weigh heavily when the programming is a local or regional network that a system has a competitive need to carry, typically a local sports or foreign language channel.²⁵⁶ Local system input is far less significant in Cox's decision-making with regard to national programming networks.²⁵⁷

124. Cox's programming strategy is constrained by the bandwidth limitations of its cable systems.²⁵⁸ Cox uses its facilities to provide a full suite of video, high-speed data, telecommunications, and other services.²⁵⁹ This limits the number of video channels Cox can carry on its systems.²⁶⁰

125. Bandwidth demands for video services have grown considerably since the early 1990s, when fewer available channels, relatively plentiful bandwidth, and lower overall programming costs made Cox more willing to take chances on distributing unproven, unknown channels, and more likely to conclude corporate "hunting licenses" that would give local systems the freedom to carry a wider variety of channels that were not carried on all of Cox's systems.²⁶¹

²⁵⁶ Cox Ex. 79, Wilson Dir. Test. ¶ 16; Hearing Tr. 4865:15-4867:11 (Wilson) (when local input is important).

²⁵⁷ Cox Ex. 79, Wilson Dir. Test. ¶ 16.

²⁵⁸ *Id.* ¶¶ 13-14.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ A hunting license sets forth the general terms of carriage but leaves specific launches to the discretion of each Cox system. *Id.* ¶ 12. Hunting licenses generally do not require system launches and do not contain pre-determined penetration levels. *Id.*

126. Since the mid-1990s, the number of available video channels has continually increased.²⁶² The emergence of HD programming since 2000 has increased bandwidth demands because Cox must dedicate bandwidth to carrying its most popular channels in three formats — analog, SD digital, and HD — to accommodate the demands of customers using different reception technologies, and because HD channels require five to six times the bandwidth required for carriage of a single SD channel.²⁶³ Accordingly, the decision to carry an HD network is a significant business and editorial decision, and Cox must be highly selective.²⁶⁴

127. System rebuilds and technological advances, including switched digital, have increased the amount of available bandwidth, but have not kept up with the increasing bandwidth demand.²⁶⁵

128. Cox has responded to these growing bandwidth demands by adopting a conservative approach to the addition of new networks.²⁶⁶ [BEGIN HIGHLY

CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]²⁶⁷ [END HIGHLY

CONFIDENTIAL] Cox has focused on using its valuable bandwidth to launch networks that

²⁶² Cox Ex. 79, Wilson Dir. Test. ¶¶ 10-12.

²⁶³ *Id.* ¶ 13; Hearing Tr. 4863:2-15 (Wilson).

²⁶⁴ Cox Ex. 79, Wilson Dir. Test. ¶ 45.

²⁶⁵ *Id.*

²⁶⁶ *Id.* ¶¶ 13-14.

²⁶⁷ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL] Hearing Tr. 5059:1-11
(Wilson) (referring to WealthTV as “marginal”).

have proven audience appeal and marketable brands, and the use of “hunting licenses” has been largely discontinued.²⁶⁸

(b) The emergence of HD programming and Cox’s HD strategy

129. In the early 2000s, HD equipment was expensive both for programmers and consumers.²⁶⁹ Only the “early adopters” of the HD technology, who were males aged 18-49 with a sufficient amount of disposable income, were spending the money to purchase HD sets.²⁷⁰

130. Cox believed that HD technology would become less expensive and more popular over time.²⁷¹ In 2002 and 2003, there was very little HD content available, but Cox expected existing cable programming networks with established name brands and audience bases would begin to distribute their networks in HD.²⁷² Once they did, their established audiences would desire those channels in HD, and Cox would have to launch those HD channels to remain competitive.²⁷³

131. By 2003, Cox needed a channel to display HD shows to the “early adopters” of HD technology.²⁷⁴ Competing MVPDs, including the DBS providers, were developing their own HD capabilities, and some were carrying HD channels.²⁷⁵ At the same

²⁶⁸ Cox Ex. 79, Wilson Dir. Test. ¶¶ 17, 18; Hearing Tr. 4864:13-4865:14, 4922:19-4923:5 (Wilson).

²⁶⁹ Cox Ex. 79, Wilson Dir. Test. ¶ 24.

²⁷⁰ *Id.* ¶ 28.

²⁷¹ *Id.* ¶ 25.

²⁷² *Id.* ¶¶ 26, 27; Hearing Tr. 4870:11-13 (Wilson).

²⁷³ Cox Ex. 79, Wilson Dir. Test. ¶ 27.

²⁷⁴ *Id.* ¶¶ 29, 30.

²⁷⁵ *Id.* ¶ 29; Hearing Tr. 4877:13-4878:9 (Wilson) (DBS offering more HD).

time, it was important to Cox to retain the ability to manage its bandwidth and keep costs low, consistent with its overall programming strategy.²⁷⁶ A significant amount of HD programming (mainly sports) that Cox systems wanted to distribute to their subscribers also was becoming available in local and regional markets.²⁷⁷

132. In 2003, the management of iN DEMAND proposed to create two channels to showcase HD programming and appeal to the early adopters: “INHD” and “INHD2.”²⁷⁸

133. While the programming for INHD and INHD2 would be supplied by iN DEMAND, Cox was free to preempt that programming to display HD programming that Cox licensed on its own.²⁷⁹ This was very important to Cox because it gave Cox a platform to offer HD content 24/7 while still allowing Cox systems the flexibility to display their own regional or local HD content, such as sports programming.²⁸⁰ Cox exercised its right to preempt programming on INHD and INHD2 frequently over the years.²⁸¹

²⁷⁶ Cox Ex. 79, Wilson Dir. Test. ¶ 30; Hearing Tr. 4878:10-4879:1 (Wilson) (need to save space for future HD channels).

²⁷⁷ See Hearing Tr. 4878:13-4879:6, 4883:21-4884:15 (Wilson).

²⁷⁸ Cox Ex. 79, Wilson Dir. Test. ¶ 32; Cox Ex. 84, Asch Dir. Test. ¶¶ 18, 21; Hearing Tr. 4878:10-4879:9, 4883:3-20 (Wilson).

²⁷⁹ Cox Ex. 79, Wilson Dir. Test. ¶ 33; Hearing Tr. 4878:13-4879:6 (Wilson) (preemption).

²⁸⁰ Cox Ex. 79, Wilson Dir. Test. ¶ 33.

²⁸¹ *Id.* ¶¶ 75, 167-70; Cox Ex. 81, Brennan Dir. Test. ¶ 24.

134. Cox viewed INHD and INHD2 as temporary and believed they eventually would be replaced by the HD feeds of existing, established digital networks.²⁸² Cox supported iN DEMAND's initiative to develop the channels because they served a short-term business need for appealing and high-quality programming for Cox's subscribers in an efficient manner.²⁸³

135. In September 2003, INHD and INHD2 launched, and Cox began carrying them shortly thereafter.²⁸⁴ Cox made INHD and INHD2 available only to Cox's HD subscribers, which represented a fraction of Cox's digital subscribers.²⁸⁵

136. Cox believed the best way to serve subscribers in the long run was to ensure its bandwidth capacity was used for the HD simulcasts of networks that customers wanted most and that Cox's competitors would most likely be offering.²⁸⁶ Cox decided to conserve its bandwidth so that it would be in a position to launch those channels as they became available.²⁸⁷

137. Cox also concluded that the best approach was to offer HD programming free to its subscribers, and it does not have a pay HD tier.²⁸⁸ Cox already paid for the SD content

²⁸² Cox Ex. 79, Wilson Dir. Test. ¶ 34; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

²⁸³ Cox Ex. 79, Wilson Dir. Test. ¶ 34.

²⁸⁴ *Id.* ¶ 35.

²⁸⁵ *Id.* ¶ 36; Hearing Tr. 4998:9-14 (Wilson).

²⁸⁶ Cox Ex. 79, Wilson Dir. Test. ¶ 39; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

²⁸⁷ Cox Ex. 79, Wilson Dir. Test. ¶ 39; Hearing Tr. 4868:22-4870:10, 4888:21-4889:8 (Wilson).

²⁸⁸ Cox Ex. 79, Wilson Dir. Test. ¶ 40; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

and believed that neither Cox nor its customers should have to pay additional fees for the same content in HD.²⁸⁹

138. For that reason, Cox bargained with programmers for the right to carry HD simulcasts of their networks at no additional charge.²⁹⁰ This was successful, and all of Cox's programming deals make HD feeds available at no additional charge to Cox's customers.²⁹¹

(c) Cox decided not to carry WealthTV for legitimate business and editorial reasons and did not discriminate against WealthTV based on its non-affiliation with Cox

139. WealthTV first approached Cox's corporate programming department in mid-2004, and again in mid-2005, seeking carriage on Cox's systems.

140. In or around May 2004, WealthTV approached Cox's corporate programming department seeking carriage and made a typical presentation for a start-up network.²⁹²

141. In June 2005, WealthTV representatives again came to Cox's corporate offices in Atlanta to pitch their network, meeting with Mr. Wilson and Pat Esser, then Cox's Chief Operations Officer, and sending a sample DVD of WealthTV programming.²⁹³

142. Cox's assessment of WealthTV in 2004 and in 2005 was based on Cox's application of the criteria it evaluates when making the editorial decision of whether to carry a

²⁸⁹ Cox Ex. 79, Wilson Dir. Test. ¶¶ 40, 43 (explaining Orange County exception).

²⁹⁰ *Id.* ¶ 40.

²⁹¹ *Id.* ¶ 41.

²⁹² *Id.* ¶¶ 51, 52; Cox Ex. 5; Hearing Tr. 3392:13-3393:4 (Herring); Cox Ex. 11.

²⁹³ Cox Ex. 79, Wilson Dir. Test. ¶ 55; Cox Exs. 6, 8, 22, 23, 56; Hearing Tr. 2889:12-2890:18, 3115:13-3117:3, 3389:11-13 (Herring).

network, including: (i) likely viewer appeal, (ii) quality of the programming, (iii) likelihood of the channel's success in light of its management and business plan, (iv) bandwidth management, (v) the proposed terms of carriage, and (vi) the local needs of Cox's cable systems, which might be attracted to regional content.²⁹⁴

143. Cox applied these editorial criteria to WealthTV in 2004 and 2005, and WealthTV failed on every measure.²⁹⁵ Based on WealthTV's presentations in 2004, Cox assessed WealthTV as a marginal network that would not bring value to its customers, and this assessment was confirmed after WealthTV's presentation to Cox in 2005.²⁹⁶

144. Cox clearly and consistently communicated to WealthTV that it was not interested in carrying the network and explained its business reasons for that decision.²⁹⁷ As Charles Herring conceded at the hearing, Cox's decision not to carry WealthTV was based on legitimate business reasons.²⁹⁸

(1) WealthTV lacked viewer or brand appeal

145. In Cox's judgment, WealthTV lacked sufficient viewer appeal to justify carriage on Cox's systems.²⁹⁹ Mr. Wilson viewed sample programming that WealthTV provided

²⁹⁴ Cox Ex. 79, Wilson Dir. Test. ¶ 48.

²⁹⁵ *Id.* ¶ 49.

²⁹⁶ *Id.* ¶¶ 54, 55; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Hearing Tr. 5058:22-5059:11 (Wilson) (WealthTV was marginal).

²⁹⁷ *See* Hearing Tr. 4900:16-4903:1 (Wilson); Cox Ex. 79, Wilson Dir. Test. ¶ 117.

²⁹⁸ *See* Hearing Tr. 3251:15-3252:7, 3274:7-13, 3284:16-3285:13, 3319:20-3320:6, 3665:14-3666:19 (Herring).

²⁹⁹ Cox Ex. 79, Wilson Dir. Test. ¶ 50; Hearing Tr. 4892:18-4893:4, 4917:20-4918:6, 4930:5-21, 4933:1-4 (Wilson).

and developed the strong opinion that WealthTV's content was "marginal" and not worth carrying on Cox's systems.³⁰⁰

146. WealthTV also lacked a well-known brand that might draw an audience, which was important to Cox, particularly with respect to launching HD channels.³⁰¹ Cox views branding as an important factor in predicting the long-term success of a network.³⁰² WealthTV provided nothing to Cox demonstrating the audience appeal of its programming.³⁰³

147. Cox believed there was nothing remarkable about WealthTV and considered it indistinguishable from the dozens of other start-up networks seeking carriage.³⁰⁴ WealthTV was playing in a very crowded field of linear programming networks and in a very tough environment for new channel start-ups and launches.³⁰⁵

148. In fact, Cox believed WealthTV's programming was very similar to the Fine Living Network, an unaffiliated network carried by Cox.³⁰⁶ Cox also believed WealthTV duplicated programming on many other unaffiliated channels Cox already carried that had

³⁰⁰ Cox Ex. 79, Wilson Dir. Test. ¶ 53; Hearing Tr. 4933:5-16, 5059:1-11 (Wilson).

³⁰¹ Cox Ex. 79, Wilson Dir. Test. ¶ 56.

³⁰² *Id.* ¶ 57; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

³⁰³ *See generally* Cox Exs. 6, 8, 22, 23, 26, 56 (WealthTV presentations and materials given to Cox).

³⁰⁴ Cox Ex. 79, Wilson Dir. Test. ¶¶ 46, 47; Hearing Tr. 4904:9-4906:19, 4930:10-21 (Wilson); Cox Ex. 4 (list of networks seeking Carriage on Cox); *see also* Hearing Tr. 3395:14-3396:1 (Herring) (acknowledging that others were seeking carriage), 3319:20-3320:3 (acknowledging more cable networks than cable capacity).

³⁰⁵ Cox Ex. 79, Wilson Dir. Test. ¶ 47; Hearing Tr. 4907:9-19 (Wilson).

³⁰⁶ Cox Ex. 79, Wilson Dir. Test. ¶ 59.

established audiences and that Cox believed would launch HD feeds.³⁰⁷ The niche WealthTV sought to fill was already served by other networks.³⁰⁸

(2) WealthTV did not present a credible basis to believe that its network had local appeal

149. Cox assesses likely viewer appeal for national networks like WealthTV at the corporate level, rather than at the local level, and not on the ability of sales people to convince Cox field representatives that a network is attractive.³⁰⁹

150. Local interest in a network among Cox systems is significant when a local system can demonstrate a competitive need for a local or regional channel, typically a regional sports or foreign language network that competitors are offering or that the local Cox system otherwise needs to remain competitive.³¹⁰ WealthTV did not fit this category because it was a national programming service, and its programming had no local or regional appeal to any of Cox's systems.³¹¹

151. When Charles Herring met with Messrs. Wilson and Esser in June 2005, he represented that there was "strong support" for the channel among Cox's systems.³¹² Cox's corporate decision-makers did not believe this claim because they had never heard a single Cox system make the competitive case for carriage of WealthTV, and there appeared to be little to no

³⁰⁷ *Id.*; Hearing Tr. 5060:13-5062:8 (Wilson).

³⁰⁸ Cox Ex. 79, Wilson Dir. Test. ¶ 59; Hearing Tr. 4930:5-21 (Wilson).

³⁰⁹ Cox Ex. 79, Wilson Dir. Test. ¶ 63.

³¹⁰ Hearing Tr. 4865:18-4867:21, 4922:6-18 (Wilson) (field must express very strong interest), 5077:22-5079:11 (Edmunds), 5287:20-5288:19 (Brennan).

³¹¹ Cox. Ex. 79, Wilson Dir. Test. ¶ 65; Hearing Tr. 4894:1-5 (Wilson).

³¹² *See* Cox Ex. 79, Wilson Dir. Test. ¶ 60.

interest in WealthTV among Cox's systems or customers.³¹³ WealthTV's presentation appeared to exaggerate the level of support for WealthTV at Cox's local systems.³¹⁴

152. Indeed, although WealthTV representatives had contacted many local Cox cable systems in 2004 and 2005,³¹⁵ only one marketing person from one system (Cox's Kansas/Arkansas system) ever contacted anyone at Cox's corporate programming department, and his level of interest was not strong.³¹⁶ He liked the idea of having another HD channel, but even he was concerned about WealthTV's content.³¹⁷ The General Manager of his system, Kimberly Edmunds, testified at trial that she did not support or have any interest in WealthTV, did not contact corporate to support WealthTV, did not believe her system had a competitive need for WealthTV, and never "approved" any deal with WealthTV, as WealthTV had claimed.³¹⁸

153. WealthTV also presented evidence that it had pitched its network to local system representatives in Cox's San Diego, Orange County, Las Vegas, and New England cable systems, but none of those systems nor any other local Cox system expressed strong interest in or a competitive need for WealthTV to Cox's corporate programming department.³¹⁹ Indeed, other

³¹³ *Id.* ¶ 61.

³¹⁴ *Id.* ¶¶ 61, 68; Hearing Tr. 5063:16-5065:14 (Wilson).

³¹⁵ WTV Ex. 144, Herring Dir. Test. at 46-49.

³¹⁶ Hearing Tr. 5085:14-5086:1 (Edmunds), 4894:15-4896:20 (Wilson).

³¹⁷ Cox Ex. 82, Edmunds Dir. Test. ¶ 12; Hearing Tr. 5085:14-5086:1 (Edmunds), 4894:15-4896:20 (Wilson).

³¹⁸ *See* Cox Ex. 82, Edmunds Dir. Test. ¶¶ 14, 15; Hearing Tr. 5085:2-5086:1 (Edmunds).

³¹⁹ WTV Ex. 144, Herring Dir. Test. at 45-46, 48-49; Cox Ex. 79, Wilson Dir. Test. ¶ 95; Cox Ex. 81, Brennan Dir. Test. ¶ 7; Hearing Tr. 5290:2-5295:4 (Brennan).

than the one employee in Cox's Kansas/Arkansas system, no Cox system ever contacted Cox's corporate programming department to discuss carriage of WealthTV.³²⁰

(3) WealthTV's business plan was unlikely to succeed

154. Cox believed WealthTV's business plan was flawed because WealthTV appeared to assume that merely offering content in HD would be sufficient to succeed in the long run.³²¹ Cox believed such a business plan would not work because all linear SD networks would roll out HD feeds at some point, and WealthTV did not have any other business justification for its channel.³²²

155. One of the factors Cox considers in determining whether to carry a new network is whether the network is being run by an experienced programming team with a proven track record.³²³ Cox believed that, while the digital networks on Cox's systems — almost all of which were unaffiliated with Cox — had proven themselves, WealthTV lacked a management team with experience in the video programming industry and lacked a reputation for delivering high quality video service over an extended period.³²⁴

³²⁰ Cox Ex. 79, Wilson Dir. Test. ¶¶ 61, 70, 72; Hearing Tr. 4894:1-17; 4897:2-12 (Wilson), 5085:14-5086:1 (Edmunds).

³²¹ Cox Ex. 79, Wilson Dir. Test. ¶ 78.

³²² *Id.*

³²³ *Id.* ¶ 80.

³²⁴ *Id.* ¶¶ 80-81; Hearing Tr. 4891:3-22 (Wilson) (WealthTV management had little experience).

(4) WealthTV was not sufficiently important to Cox’s customers or competitive position to justify occupying bandwidth

156. Based on its bandwidth constraints, Cox concluded that WealthTV did not justify carriage, especially considering the significant opportunity cost.³²⁵

(5) Cox never would have considered carriage of WealthTV on the proposed terms of carriage

157. As Bob Wilson testified, Cox never would have considered carrying WealthTV on the terms it proposed.³²⁶ Although WealthTV presented a term sheet to Cox on September 17, 2004, that purported to offer “free” carriage for four years, Cox did not consider that to be a realistic offer of “free” carriage because it came with conditions that were unacceptable or impossible.³²⁷ To be eligible, Cox was required to accept the offer within two weeks and would have been required to launch WealthTV on 80% of its digital systems and 100% of its HD systems within two weeks or sign a letter of intent requiring carriage for four years.³²⁸ As a practical matter, the technical work required to meet those requirements could not have been completed within that period.³²⁹

158. WealthTV’s proposal was a non-starter for Cox.³³⁰ Cox never would have committed its bandwidth and resources to such an extensive rollout of an unproven, marginal

³²⁵ Cox Ex. 79, Wilson Dir. Test. ¶ 84; *see also* Section (b), *supra*; Cox Ex. 4 (list of networks seeking carriage on Cox); Cox Exs. 17-19; Hearing Tr. 4901:5-14 (Wilson).

³²⁶ Cox Ex. 79, Wilson Dir. Test. ¶ 86; Hearing Tr. 5068:7-14 (Wilson).

³²⁷ Cox Ex. 79, Wilson Dir. Test. ¶ 87; *see also* Cox Ex. 11.

³²⁸ Cox Ex. 79, Wilson Dir. Test. ¶¶ 88, 89; Cox Ex. 11.

³²⁹ Cox Ex. 79, Wilson Dir. Test. ¶ 89.

³³⁰ *See id.* ¶¶ 86-90.

service, which had only been running for about three months.³³¹ The WealthTV proposal would have exposed Cox to extremely high per-subscriber licensing fees if Cox failed to reach the penetration levels set by WealthTV.³³² The fees were many times higher than Cox would have paid for a typical new network, and because Cox did not have an HD tier, it would have been unable to recoup those fees.³³³ Paying for WealthTV would have been inconsistent with Cox's strategy of providing its HD programming for free to its subscribers.³³⁴

159. The terms of the WealthTV proposal were so obviously unacceptable to Cox for a marginal start-up with no audience, brand, track record or experience, that Cox questioned the judgment of the WealthTV management team in even making such an offer.³³⁵

(d) Cox's decision not to carry WealthTV was not made on the basis of affiliation or non-affiliation

160. Cox's decision not to carry WealthTV was based on legitimate business considerations — its lack of appeal and value to Cox's customers, its lack of a realistic business plan with experienced programmers, its lack of an established audience or track record or brand, and Cox's bandwidth constraints — and not on the basis of non-affiliation with Cox.³³⁶

³³¹ *Id.* ¶ 90; Hearing Tr. 4897:13-4898:21, 4917:3-17 (Wilson) (terms were unacceptable).

³³² Cox Ex. 79, Wilson Dir. Test. ¶ 91.

³³³ *Id.*; Hearing Tr. 4897:13-4898:1 (Wilson) (WealthTV was an expensive service).

³³⁴ Cox Ex. 79, Wilson Dir. Test. ¶ 91.

³³⁵ *Id.* ¶ 92; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

³³⁶ Cox Ex. 79, Wilson Dir. Test. ¶ 96; Hearing Tr. 4892:18-4893:4 (Wilson) (WealthTV content was not something Cox subscribers would value).

161. Cox launched many HD simulcasts of non-affiliated networks during the same period WealthTV was seeking carriage, including A&E HD in September 2006, National Geographic HD in April 2007, and Food Network HD in November 2007, and it rejected dozens of other HD-only networks, such as Smithsonian HD and MGM HD.³³⁷ Of the more than 40 HD networks Cox carries, only one is affiliated with Cox, and Cox launched that channel's HD signal in 2008.³³⁸

162. Cox's decision not to carry WealthTV was not based on discrimination in favor of Cox's affiliated network INHD/MOJO.³³⁹ Cox made its decision not to carry WealthTV after the presentations by WealthTV in 2004 and 2005 — well before iN DEMAND had even started to re-brand INHD as MOJO, which occurred in 2007 — and Cox never had any reason to change its position after 2005.³⁴⁰

163. Cox never compared WealthTV to INHD/MOJO in deciding whether to carry WealthTV.³⁴¹ Cox had already launched INHD nine months before WealthTV even existed.³⁴² Cox's carriage of INHD/MOJO was never a consideration in Cox's decision not to carry WealthTV.³⁴³ Moreover, WealthTV never portrayed itself to Cox as similar to INHD/MOJO at any time prior to its pre-filing notice in this case.³⁴⁴

³³⁷ Cox Ex. 79, Wilson Dir. Test. ¶¶ 79, 97; *see also* Cox Ex. 13 (list of all networks launched by Cox since January 2004); Hearing Tr. 4909:4-8, 5050:15-5051:2 (Wilson).

³³⁸ Cox. Ex. 79, Wilson Dir. Test. ¶ 103; *see also* Cox Ex. 13; Hearing Tr. 4908:4-12 (Wilson).

³³⁹ Cox Ex. 79, Wilson Dir. Test. ¶¶ 46-49.

³⁴⁰ *Id.* ¶ 98; Hearing Tr. 4909:9-12 (Wilson); *see also* Cox Ex. 84, Asch Dir. Test. ¶ 55.

³⁴¹ Cox Ex. 79, Wilson Dir. Test. ¶ 74; Hearing Tr. 4909:13-16 (Wilson).

³⁴² Cox Ex. 79, Wilson Dir. Test. ¶¶ 74, 76.

³⁴³ *Id.* ¶¶ 74, 76; Hearing Tr. 4909:13-16 (Wilson).

(e) **Cox applied its standard criteria when it decided to carry INHD/MOJO**

164. When deciding to carry INHD, Cox applied the same criteria it considered when it made other carriage decisions, and INHD satisfied each of those criteria.³⁴⁵ Cox believed INHD was highly likely to have viewer appeal because it would provide (a) a valuable showcase for 24/7 HD-formatted content, including professional sports programming, and (b) a valuable platform for local systems to preempt scheduled programming and display extremely popular local HD content.³⁴⁶

165. Cox believed iN DEMAND had the expertise and experience to execute this strategic, short-term business plan.³⁴⁷ Cox concluded the terms of carriage for INHD/MOJO were attractive because Cox could drop the channel at any time and the cost was reasonable for a network that would be carried on a temporary basis.³⁴⁸ INHD/MOJO was a way to provide more HD content on “very favorable terms and conditions.”³⁴⁹

166. Consistent with its view of INHD/MOJO as a temporary channel, Cox did not attempt to develop it into a long-term network.³⁵⁰

³⁴⁴ See, e.g., Cox Exs. 6, 8, 22, 23, 56 (WealthTV Presentations to Cox).

³⁴⁵ Hearing Tr. 4863:6-15, 4877:19-4879:13, 4881:10-4883:20, 4885:1-11, 4888:1-4890:8, 4925:9-14, 4940:3-17, 4959:6-16 (Wilson).

³⁴⁶ Hearing Tr. 4877:13-4879:6, 4882:3-11, 4883:2-4885:15, 4926:14-22 (Wilson).

³⁴⁷ *Id.* at 4873:11-4874:3, 4875:17-4877:12, 4885:1-11, 4889:9-21, 4929:13-4930:4 (Wilson).

³⁴⁸ *Id.* at 4878:10-4879:13, 4885:1-11, 4925:9-14, 4940:3-17, 4959:6-16, 4978:1-17 (Wilson).

³⁴⁹ *Id.* at 4925:9-14, 4959:6-16 (Wilson).

³⁵⁰ Cox Ex. 79, Wilson Dir. Test. ¶ 163.

167. Cox did not seek to have iN DEMAND maximize its distribution of MOJO.³⁵¹ Cox only made the network available to Cox's HD subscribers, which in early 2008 [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] ³⁵² [END HIGHLY CONFIDENTIAL] This limited the reach of the network but made business sense because Cox used it as a temporary HD showcase.³⁵³

168. Cox also preempted INHD and MOJO frequently, including after the network was fully branded as MOJO, which Cox knew would make it more difficult to build an audience and sell advertising.³⁵⁴

169. By late 2007, the INHD/MOJO channel was losing its appeal to Cox because many HD feeds of established digital networks were being launched, and the need for an HD showcase was diminishing.³⁵⁵ However, so long as Cox could preempt the network for its own HD programs (mainly sports), the channel still served a useful purpose.³⁵⁶

(f) Cox continued its strategy of launching HD simulcasts of digital networks and offering them free to subscribers and did not engage in a pattern of discrimination against non-affiliated programmers

170. As more HD content became available in 2005 and 2006, Cox stayed true to its strategy and launched the HD simulcasts of established networks and provided them free to

³⁵¹ *Id.* ¶ 165.

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.* ¶¶ 166-71.

³⁵⁵ *Id.* ¶ 113.

³⁵⁶ *Id.*

HD subscribers.³⁵⁷ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED],³⁵⁸ [REDACTED]

[REDACTED]

[REDACTED].³⁵⁹ [END HIGHLY CONFIDENTIAL]

171. In responding to sporadic communications initiated by WealthTV in 2006 and 2007, Mr. Wilson always explained, clearly and consistently, that Cox's decision not to carry WealthTV had not changed and why.³⁶⁰

172. Despite repeated efforts to persuade Cox to carry their network up through 2007, WealthTV's management never presented anything that caused Cox to reconsider its initial judgment.³⁶¹ In Cox's continuing internal evaluations of available networks, WealthTV always fared poorly.³⁶²

³⁵⁷ *Id.* ¶¶ 99-100.

³⁵⁸ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]
see also Cox Ex. 79, Wilson Dir. Test. ¶ 100.

³⁵⁹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]
Cox Ex. 79, Wilson Dir. Test. ¶¶ 100, 101.

³⁶⁰ Cox Ex. 79, Wilson Dir. Test. ¶¶ 117, 120-23; Cox Exs. 17, 18, 19.

³⁶¹ Cox Ex. 79, Wilson Dir. Test. ¶ 124; Hearing Tr. 4909:9-12 (Wilson); [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

³⁶² Cox Ex. 79, Wilson Dir. Test. ¶¶ 118, 119; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

(g) **Once INHD/MOJO outlived its useful purpose for Cox, Cox advocated that iN DEMAND should shut down the network**

173. By early 2008, Cox had concluded that MOJO was beginning to outlive its useful purpose for Cox.³⁶³ Although iN DEMAND's management recommended that the Owners continue to build and fund the network,³⁶⁴ Cox was skeptical of iN DEMAND management's financial projections for MOJO.³⁶⁵

174. Cox conducted an internal, informal study of MOJO's audience in one of Cox's systems and concluded that MOJO was one of the least viewed HD networks Cox carried.³⁶⁶ Cox also determined that it no longer made economic sense to continue paying for MOJO to showcase HD content when many popular HD channels had become available.³⁶⁷

175. Cox concluded the function INHD/MOJO had served was becoming unnecessary and that MOJO should be terminated so Cox could use the bandwidth for other purposes.³⁶⁸

³⁶³ Cox Ex. 79, Wilson Dir. Test. ¶ 144; Hearing Tr. 4948:6-05 (Wilson).

³⁶⁴ See Cox Ex. 84, Asch Dir. Test. ¶ 86; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Cox Ex. 79, Wilson Dir. Test. ¶¶ 148-49.

³⁶⁵ Cox Ex. 79, Wilson Dir. Test. ¶¶ 148-49; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

³⁶⁶ Cox Ex. 79, Wilson Dir. Test. ¶¶ 150-52; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Hearing Tr. 4924:19-4925:3, 4947:10-20 (Wilson).

³⁶⁷ Cox Ex. 79, Wilson Dir. Test. ¶¶ 155-57.

³⁶⁸ *Id.* ¶¶ 154, 157; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Hearing Tr. 4950:4-4951:6, 4953:15-21 (Wilson).

- (h) Cox had no incentive to discriminate against WealthTV in favor of MOJO and had too few subscribers to significantly restrain WealthTV's ability to obtain viewers or advertisers

176. As Bob Wilson and Dr. Ordoover testified, Cox had no reason or incentive to protect MOJO or to discriminate against WealthTV in favor of MOJO.³⁶⁹ Cox's ownership in iN DEMAND was too small an interest in the overall business to provide an incentive to try to favor MOJO over WealthTV, even assuming MOJO might have benefited from the non-carriage of WealthTV, which is not an accurate assumption.³⁷⁰

177. Cox has almost no affiliated programming, and its core business strategy did not involve developing and launching affiliated programming during the relevant period (or currently).³⁷¹ During this time, Cox virtually eliminated its affiliated services.³⁷² Cox had no reason to favor affiliated programming (which Cox was eliminating) over WealthTV.³⁷³

178. In any event, MOJO would not have benefited from a denial of carriage of WealthTV on Cox's systems.³⁷⁴ As Dr. Ordoover testified, MOJO had no "first mover" advantage over WealthTV in the marketplace, because the marketplace was filled with competitors for advertisers and subscribers, and the presence or absence of WealthTV was

³⁶⁹ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] Hearing Tr. 5380:9-5381:14, 5448:4-5449:16 (Ordoover); Cox Ex. 79, Wilson Dir. Test. ¶¶ 172-73.

³⁷⁰ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

³⁷¹ Cox Ex. 79, Wilson Dir. Test. ¶ 177.

³⁷² *Id.* ¶ 178.

³⁷³ *See id.* ¶¶ 172, 177-80.

³⁷⁴ *Id.* ¶ 173; [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

immaterial to the success of MOJO.³⁷⁵ Cox did not have the ability to deny WealthTV a “first mover” advantage in the marketplace.³⁷⁶

179. Cox also had too few subscribers to significantly restrain WealthTV’s ability to obtain viewers or advertisers. Cox had only about [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] HD subscribers at the time, and all of them were accessible to WealthTV through DirecTV, Dish Network, AT&T or Verizon.³⁷⁷

180. Cox’s subscribers were even less significant to WealthTV because they were not in markets that mattered to WealthTV.³⁷⁸ WealthTV claims that carriage in the country’s top 25 Designated Market Areas (“DMAs”) is critical to its success, and that was WealthTV’s focus in seeking carriage. Cox is the primary cable provider in only one of the country’s 25 largest DMAs, Phoenix, Arizona.³⁷⁹ Cox is the sixth largest MSO when ranked by subscribers within the top 25 DMAs, and Cox would be the eighth largest MVPD in the top 25 DMAs if DirecTV and Dish Network were included.³⁸⁰

³⁷⁵ Cox Ex. 79, Wilson Dir. Test. ¶ 173.

³⁷⁶ *Id.* ¶¶ 163, 173; [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

³⁷⁷ See Cox. Ex. 79, Wilson Dir. Test. ¶ 165; Cox Ex. 44, Ordoover Expert Report ¶¶ 7-11.

³⁷⁸ See WTV Ex. 48 (Chart of Top 25 DMAs).

³⁷⁹ *Id.*; see also Cox Ex. 79, Wilson Dir. Test. ¶ 7; Hearing Tr. 4863:16-18 (Wilson).

³⁸⁰ See WTV Ex. 48.

(i) **Forcing Cox to carry WealthTV will force many Cox systems to drop existing programming services**

181. Before, during and after the termination of INHD/MOJO, Cox made full use of its bandwidth to launch new HD networks, almost all of which have been simulcasts of unaffiliated networks carried on Cox's expanded basic and digital tiers.³⁸¹ [BEGIN

CONFIDENTIAL] [REDACTED]

[REDACTED]³⁸² [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]³⁸³ [END CONFIDENTIAL]

D. BHN Did Not Discriminate Against WealthTV On The Basis Of Affiliation Or Non-Affiliation

182. BHN is the eighth largest MVPD and sixth largest cable operator in the United States, measured in terms of basic video subscribers.³⁸⁴ As of March 31, 2008, BHN had approximately 2,312,000 basic video subscribers.³⁸⁵

183. BHN operates cable systems around the areas of Tampa, FL; Orlando/Central, FL; Indianapolis, IN; Birmingham, AL; Bakersfield, CA; and Detroit, MI.³⁸⁶

³⁸¹ Cox. Ex. 79, Wilson Dir. Test. ¶ 162.

³⁸² [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

³⁸³ [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL]

³⁸⁴ TWC Ex. 75; BHN Ex. 9, Declaration of Steve Miron ¶ 4.

³⁸⁵ *Id.*

³⁸⁶ *Id.* ¶ 1.

184. BHN is an affiliate of Time Warner Entertainment – Advance/Newhouse Partnership (“TWE-A/N”), which is a general partnership whose interests are held by the “TW Partners” (direct and indirect affiliates of TWC) and by Advance/Newhouse (a partnership owned by subsidiaries of Advance Publications Inc. and Newhouse Broadcasting Corporation).³⁸⁷

185. Advance/Newhouse’s interest in the TWE-A/N partnership tracks the economic performance of BHN’s cable systems, which were transferred to BHN in December of 2002 along with their associated assets and liabilities.³⁸⁸

186. BHN does not have any economic stake in any cable systems owned or operated by TWC (including the other cable systems owned by TWE-A/N that are operated by TWC), nor did BHN have any economic stake in any of the programming services affiliated with TWC during the period of 2004-2008,³⁸⁹ with the exception of iN DEMAND, the former distributor of MOJO.³⁹⁰

187. BHN’s interest in iN DEMAND is limited and attenuated.³⁹¹ BHN’s actual economic interest in iN DEMAND is only approximately five percent due to the structure

³⁸⁷ *Id.* ¶ 2; Hearing Tr. 4482:1-12 (Miron).

³⁸⁸ BHN Ex. 9, Declaration of Steve Miron ¶ 2.

³⁸⁹ Several national programming services are no longer affiliated with TWC due to the spin-off of TWC from Time Warner Inc. BHN did not (and does not) have any economic stake in any of those programming services.

³⁹⁰ BHN Ex. 9, Declaration of Steve Miron ¶ 3

³⁹¹ *Id.*

of the TWE-A/N partnership.³⁹² Because BHN is wholly owned by the TWE-A/N partnership, it had no direct ownership stake in MOJO.³⁹³

188. As an affiliate of the TWE-A/N partnership, BHN is eligible for inclusion under the programming contracts that TWC negotiates with national cable networks; meaning BHN is eligible to pay the same rates for programming as those negotiated by TWC.³⁹⁴

189. Before TWC commits to a programming contract, TWC confers with BHN to ensure that BHN is interested in being part of the programming contract.³⁹⁵

190. In all cases, BHN maintains its editorial independence with respect to programming decisions — BHN, not TWC, has the decision-making authority over what programming is carried on BHN's cable systems.³⁹⁶

191. BHN has used its editorial independence to reach separate carriage agreements from TWC.³⁹⁷ For instance, in the last two years, BHN negotiated directly with A&E to carry History Channel HD during a time when TWC was not conducting negotiations with A&E.³⁹⁸ BHN also directly negotiated with an interactive programming service called

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* ¶ 7; Hearing Tr. 4483:12-4484:1 (Miron).

³⁹⁵ Hearing Tr. 4084:8-4085:1 (Witmer).

³⁹⁶ *Id.* at 4441:11-22 (Stith), 4484:12-16 (Miron).

³⁹⁷ *Id.* at 4508:12-17 (Miron).

³⁹⁸ *Id.* at 4509:6-4510:7 (Miron).

ReacTV for carriage on BHN's Tampa system.³⁹⁹ TWC was not a part of the negotiations for these contracts, nor was it a party to the resulting contracts.⁴⁰⁰

192. Through its regular consultations with TWC, BHN provides input, and occasionally recommendations, for programming services.⁴⁰¹ For instance, in 2009, BHN approached TWC about negotiating a carriage agreement with the YES Network (the network with exclusive television rights to the Major League Baseball's New York Yankees games).⁴⁰² As a result, TWC reached a carriage agreement with YES Network that now enables BHN to carry the network on its Florida systems.⁴⁰³

193. In deciding whether to carry a particular programming service, BHN relies on a number of different factors, including: customer demand, bandwidth limitations (which are continually strained due to the introduction of new services), the financial and other terms proposed by programmers, whether the service is offered by competitors, input from divisional management, and a system's existing programming mix.⁴⁰⁴

194. BHN used these same factors to make its carriage decision regarding WealthTV.⁴⁰⁵

³⁹⁹ *Id.* at 4510:8-15 (Miron).

⁴⁰⁰ *Id.* at 4590:6-4510:19 (Miron).

⁴⁰¹ BHN Ex. 9, Declaration of Steve Miron ¶ 7.

⁴⁰² Hearing Tr. 4511:13-4512:10 (Miron).

⁴⁰³ *Id.*

⁴⁰⁴ BHN Ex. 9, Declaration of Steve Miron ¶ 8; Hearing Tr. 4484:17-4486:4, 4528:18-4529:21 (Miron).

⁴⁰⁵ Hearing Tr. 4486:5-15 (Miron).

195. WealthTV has presented no direct evidence that BHN did not use the aforementioned factors to make the WealthTV carriage determination, nor did WealthTV provide any direct evidence that BHN examined any additional factors, such as network ownership/affiliation.

196. Without contradiction, the chief executive officer of BHN testified that BHN's ownership interest in the MOJO programming service was not a factor in its decision not to carry WealthTV.⁴⁰⁶

197. Given the size of BHN's ownership interest in iN DEMAND, the company which produced the MOJO program service, BHN had no economic incentive to discriminate against WealthTV in favor of MOJO.⁴⁰⁷

198. Customer demand is particularly important in BHN's decision-making due to the intense competition that BHN faces from DBS providers and other program distributors, including the telephone companies.⁴⁰⁸ BHN is very cognizant of the fact that customers will take their business to competitors if BHN does not offer them desirable programming at a reasonable price.⁴⁰⁹

199. BHN undertakes comprehensive efforts to ascertain customer demand for programming which include: monitoring customer calls and e-mails that request programming services, conducting focus groups, and using telemarketing and Internet surveys.⁴¹⁰ The results

⁴⁰⁶ *Id.* at 4486:19-4487:2 (Miron).

⁴⁰⁷ BHN Ex. 8, Ordoover Expert Report ¶ 23; Hearing Tr. 5378:18-5380:8 (Ordoover).

⁴⁰⁸ BHN Ex. 9, Declaration of Steve Miron ¶ 11; Hearing Tr. 4484:21-4485:6 (Miron).

⁴⁰⁹ BHN Ex. 9, Declaration of Steve Miron ¶ 11.

⁴¹⁰ *Id.* ¶ 10; Hearing Tr. 4429:4-4430:1 (Stith).

of these efforts are heavily relied upon by BHN personnel making programming carriage decisions.⁴¹¹

200. Through these efforts, BHN has discovered that its customers are generally interested in programming from well-established cable “brands,” *i.e.*, networks that have recognizable names that customers are already familiar with.⁴¹²

201. To assist with its customer survey efforts, in 2007 BHN brought on a research expert, James Mead, to conduct customer surveys as a regular part of BHN’s business activities.⁴¹³

202. In July of 2007, James Mead, at the direction of BHN, conducted a survey of its customers to gauge interest in currently available HD networks that BHN was not carrying at the time.⁴¹⁴ BHN intended to add additional HD networks to its lineup and planned to use the results of the survey to inform its decision on what networks to carry.⁴¹⁵

203. The results of the survey showed that BHN’s customers had very little interest in WealthTV, with WealthTV ranking second to last for consumer requests among the 37 channels in the survey.⁴¹⁶ The lack of interest in WealthTV in the survey weighed directly in BHN’s decision not to carry WealthTV.⁴¹⁷

⁴¹¹ Hearing Tr. 4435:19-4436:4 (Stith).

⁴¹² *Id.* at 4500:18-4501:9 (Miron).

⁴¹³ *Id.* at 4430:2-4431:13 (Stith).

⁴¹⁴ BHN Ex. 3 (HD Programming Study); BHN Ex. 9, Declaration of Steve Miron ¶10; Hearing Tr. 4498:10-20 (Miron).

⁴¹⁵ Hearing Tr. 4498:10-20 (Miron).

⁴¹⁶ BHN Ex. 3 (HD Programming Study).

⁴¹⁷ Hearing Tr. 4500:12-15 (Miron).

204. The results of the survey mirrored the information that BHN's corporate office was receiving from both customers and its Division offices — customer inquiries regarding WealthTV were virtually non-existent.⁴¹⁸

205. There is no record evidence that BHN ever expressed any interest in carrying WealthTV, either before or after MOJO existed as a channel.

206. BHN first became aware of WealthTV in the fourth quarter of 2004, when a WealthTV representative contacted Anne Stith, who at the time was the Director of Product Marketing for the Tampa Division of BHN.⁴¹⁹

207. Ms. Stith did not express any interest in the service at that time, believing that the content was not of high enough quality and would not be of interest to BHN customers.⁴²⁰

208. In 2004, when Ms. Stith failed to express any interest in WealthTV, MOJO was not in existence.

209. In February 2005, Ms. Stith sent an e-mail to Nico Fasano at WealthTV in response to a request from her boss, BHN Vice President of Marketing for the Tampa Division, Stephen Colafrancesco, whom Mr. Fasano had originally contacted.⁴²¹ In the e-mail, which Ms. Stith described as a courtesy, Ms. Stith offered to provide information about BHN's Tampa

⁴¹⁸ *Id.* at 4529:22-4530:12 (Miron).

⁴¹⁹ BHN Ex. 10, Declaration of Anne Stith ¶ 4.

⁴²⁰ Hearing Tr. 4461:22-4462:10 (Stith).

⁴²¹ WTV Ex. 189; Hearing Tr. 4445:3-4446:22 (Stith).

system and asked to learn more about WealthTV's service.⁴²² There was no evidence presented that WealthTV responded to Ms. Stith's e-mail.

210. In July of 2006, Ms. Stith became aware that WealthTV had been added to Verizon FiOS' channel lineup in Tampa.⁴²³ Because FiOS was a direct competitor to BHN in the Tampa area, Ms. Stith was asked by her corporate supervisors to gather more information about the WealthTV service — her subsequent inquiries to WealthTV were purely exploratory and for research purposes.⁴²⁴

211. WealthTV did not immediately respond to Ms. Stith's July 2006 inquiry with any information.⁴²⁵ It was three to four weeks before Ms. Stith received a return contact, in the form of a phone call, from WealthTV.⁴²⁶ Eventually, a meeting was set up between Ms. Stith and John Scaro, a representative of WealthTV, on February 9, 2007.⁴²⁷

212. At the February 9, 2007 meeting both Ms. Stith and the other representative present from BHN, Michelle Stuart, the Senior Director of Marketing for the Tampa Division, responded courteously to WealthTV's presentation but neither Ms. Stith nor Ms. Stuart made any statements that BHN had any interest in carrying WealthTV or would take any action to pursue carriage.⁴²⁸

⁴²² *Id.*

⁴²³ BHN Ex. 10, Declaration of Anne Stith ¶ 5.

⁴²⁴ *Id.*

⁴²⁵ Hearing Tr. 4462:20-4463:21 (Stith).

⁴²⁶ *Id.*

⁴²⁷ BHN Ex. 10, Declaration of Anne Stith ¶ 6; Hearing Tr. 4460:21-4461:18 (Stith).

⁴²⁸ BHN Ex. 10, Declaration of Anne Stith ¶ 7.

213. Following the February 9, 2007 meeting, Mr. Scaro spoke with Steve Miron, BHN's President.⁴²⁹ Because Mr. Miron knew that BHN had no independent interest in carrying WealthTV, he suggested that Mr. Scaro attempt to negotiate an agreement with TWC.⁴³⁰

214. On March 6, 2007, Mr. Scaro contacted Ms. Stith, Ms. Stewart and Mr. Colafrancesco via e-mail, attaching a press release concerning the launch of WealthTV's HD VOD programming on TWC's San Antonio cable system.⁴³¹

215. In response to an e-mail from Mr. Colafrancesco on March 6, 2007, Ms. Stith stated her opinion on whether WealthTV should be carried by BHN by stating, "Bottom line Nice product, not worth an HD channel spectrum – when we can see pretty videos of wealth travel locations and great restaurants on Travel and Food TV – and most importantly no customer demand."⁴³²

216. WealthTV did not attempt to contact anyone at BHN to negotiate a direct carriage agreement after WealthTV was unable to secure a carriage agreement with TWC.⁴³³ At no point during any of its interactions with BHN did WealthTV ever present anyone from BHN with an actual proposal with terms and conditions for carriage.⁴³⁴

⁴²⁹ BHN Ex. 9, Declaration of Steve Miron ¶ 12; Hearing Tr. 4506:15-4507:21 (Miron).

⁴³⁰ *Id.*

⁴³¹ BHN Ex. 1; BHN. Ex. 10, Declaration of Anne Stith ¶ 11.

⁴³² BHN Ex. 2; BHN Ex. 10, Declaration of Anne Stith ¶ 11; Hearing Tr. 4427:11-4428:2 (Stith).

⁴³³ Hearing Tr. 4502:8-13 (Miron).

⁴³⁴ *Id.* at 4421:20-4422:11 (Stith), 4533:21-4534:9 (Miron).

217. BHN's ownership interest in MOJO played no role in BHN's lack of interest in WealthTV.⁴³⁵

218. During the time in 2006 and 2007 that WealthTV was interacting with Ms. Stith when she was making her judgments about the quality and desirability of WealthTV's programming, Ms. Stith was not even aware that MOJO was affiliated with BHN.⁴³⁶

219. WealthTV presented no direct evidence that showed any employee of BHN who was considering the possible carriage of WealthTV on any BHN system considered BHN's affiliation with MOJO as part of their considerations regarding WealthTV.

E. WealthTV's Experience With Other MVPDs Confirms That The Business Reasons Relied Upon By Defendants In Considering WealthTV Are Legitimate

220. As discussed above, each of the Defendants had legitimate business reasons for not providing full linear carriage to WealthTV, ranging from insufficiently compelling content, high fees, inexperienced management, a lack of track record and consumer research, and bandwidth constraints.⁴³⁷ TWC's industry expert, Howard Homonoff, has opined that these business considerations are prevalent throughout the industry.⁴³⁸

221. WealthTV nonetheless asserts that the business reasons advanced by each of the Defendants are pretextual, that no Defendant negotiated in good faith with WealthTV, and

⁴³⁵ *Id.* at 4420:9-4421:19 (Stith), 4486:16-21 (Miron).

⁴³⁶ *Id.* at 4420:15-4421:8 (Stith).

⁴³⁷ *See, e.g.*, Proposed Findings of Fact at ¶¶ 50-52, 105-117, 152-180, 237-240, *supra*.

⁴³⁸ TWC Ex. 86, Homonoff Dir. Test. ¶¶ 10, 19-24.

that the underlying reason for denial of carriage was each Defendant's interest in protecting its affiliate, MOJO.⁴³⁹

222. Charles Herring's trial testimony, however, fatally undermines WealthTV's position, and confirms that the Defendants did not discriminate against WealthTV. Mr. Herring acknowledged on cross-examination that each Defendant had non-discriminatory, legitimate business reasons for deciding not to carry WealthTV:

Q My question is, is it your contention in this case that the only reason why you're not carried on the defendants' cable systems is because of the defendants' affiliation with iN DEMAND?

A I would have to say no.

Q There are, in fact, business reasons not to carry WealthTV. Right?

A There's business reasons not to carry WealthTV, yes.

Q And you're not saying, are you, that each of these defendants had no legitimate business reasons for not carrying WealthTV?

A No.⁴⁴⁰

223. For example, Mr. Herring agreed that bandwidth constraints were a concern and that "all cable companies have limited capacity."⁴⁴¹ He further recognized that there are more cable networks seeking carriage on cable operators than there are channels available, and therefore not every start-up network gets carriage.⁴⁴² Mr. Herring also acknowledged that to

⁴³⁹ See, e.g., WTV Ex. 144, Herring Dir. Test. at 35-39, 44-45, 47.

⁴⁴⁰ Hearing Tr. 3251:15-3252:7 (Herring).

⁴⁴¹ *Id.* at 3274:7-13 (Herring).

⁴⁴² *Id.* at 3319:20-3320:6 (Herring).

the extent a programming network's rate structure added additional expense for an MVPD, that would be a legitimate issue, because in his experience "[t]here's always concerns about rates."⁴⁴³

224. Ultimately, Mr. Herring admitted that legitimate business reasons guided both the actions of the Defendants in declining to carry WealthTV, and WealthTV's decisions to walk away from further negotiations:

Q Mr. Herring, there was considerable testimony about the availability of cable channels on various systems' capacity, correct?

A Yes.

Q And would you agree that capacity – that the decision to reject carriage based on capacity is a legitimate business decision by various cable companies?

A Yes.

Q Now, you testified on redirect that you, meaning WealthTV, ceased negotiating with carriers on, I think, two occasions and also did not renew an agreement on one occasion because of what you described as legitimate business decisions; is that correct?

A I'm just trying to think through it. I'm not sure I followed the question.

Q Well, let me rephrase it. On redirect when your counsel asked you questions a few minutes ago, you were asked why you had stopped negotiating with two of the cable Defendants, and I believe you said that you did so based on legitimate, what you considered to be legitimate business decisions.

A Yes.⁴⁴⁴

* * * * *

⁴⁴³ *Id.* at 3284:16-3285:13 (Herring).

⁴⁴⁴ *Id.* at 3665:14-3666:19 (Herring).

Q Okay. So you were making legitimate business decisions as were the cable operators; is that correct?

A Yes.

Q That's fair to say?

A Yes.⁴⁴⁵

225. WealthTV's discrimination theory further crumbles in the face of evidence that it was denied carriage by other MVPDs for many of the exact same reasons that underlay Defendants' respective decisions. WealthTV has failed to gain carriage on most of the top 25 MVPDs in the country, most of which are not affiliated with iN DEMAND or MOJO, and thus were not denying carriage to WealthTV in order to protect MOJO.⁴⁴⁶ Rather, these MVPDs are choosing not to carry WealthTV because of legitimate business reasons such as lack of bandwidth and high fees. This industry reaction to WealthTV confirms that Defendants' rationales for denying carriage are not pretextual but merely reflective of the common sentiment held in the industry as to the value proposition of WealthTV.

226. For example, WealthTV has tried for five years and failed to get any carriage on Cablevision, the seventh largest MVPD in the country. During the summer of 2007, Cablevision informed WealthTV that because it obtained free HD feeds from established networks, it had no interest in signing up a network that charged it for its HD programming.⁴⁴⁷ Cablevision is not the only cable operator that expressed cost concerns to WealthTV. Dish

⁴⁴⁵ *Id.* at 3667:6-11 (Herring).

⁴⁴⁶ *See also* TWC Ex. 75.

⁴⁴⁷ TWC Ex. 40; Hearing Tr. 3280:1-3283:20 (Herring).

Network and WealthTV similarly could not reach agreement because of pricing and other issues.⁴⁴⁸

227. WealthTV has tried and failed to secure carriage on Cable One, a cable MVPD unaffiliated with iN DEMAND or MOJO. Cable One told WealthTV in 2007 that it had capacity and bandwidth constraints and did not plan to launch an HD network such as WealthTV for two to three years.⁴⁴⁹

228. WealthTV also is not carried on Suddenlink, an MVPD not affiliated with iN DEMAND or MOJO. Charles Herring has met with Suddenlink executive Patty McCaskill on several occasions over the years seeking a carriage agreement. Suddenlink has informed WealthTV that it lacked the necessary bandwidth to launch WealthTV.⁴⁵⁰

229. These companies have rejected WealthTV for many of the same legitimate business reasons that drove the decision-making of each of the Defendants. Like Cablevision, Comcast and Cox were concerned about the level of the fees WealthTV sought to charge, and this was a contributing factor in their decision-making.⁴⁵¹ Like Cable One and Suddenlink, each of the Defendants concluded that they could not devote their limited bandwidth on a linear basis to an untested network like WealthTV.⁴⁵² These are all legitimate business reasons that WealthTV's own industry expert, Sandra McGovern, recognizes to be important to all

⁴⁴⁸ See TWC Ex. 36.

⁴⁴⁹ TWC Ex. 27; Hearing Tr. 3291:22-3292:13 (Herring).

⁴⁵⁰ Hearing Tr. 3290:22-3291:21 (Herring); TWC Ex. 55.

⁴⁵¹ See, e.g., Proposed Findings of Fact at ¶¶ 113-14, 177-79, *supra*.

⁴⁵² *Id.* at ¶¶ 50-52, 113-14, 176, *supra*.

MVPDs.⁴⁵³ In short, WealthTV cannot support claims of discrimination against Defendants when the reasoning behind their carriage decisions mirror those of MVPDs that had no ownership interest in MOJO and thus could not have engaged in affiliation-based discrimination against WealthTV.

V. WEALTHTV HAS NOT PROVEN THAT AN INFERENCE OF DISCRIMINATION CAN BE DRAWN AGAINST DEFENDANTS BASED ON THE ALLEGED SUBSTANTIAL SIMILARITY OF WEALTHTV AND MOJO

230. Without direct evidence establishing that any of the Defendants discriminated against WealthTV, WealthTV seeks to have the Presiding Judge draw an inference of discrimination based upon the asserted substantial similarity of WealthTV and MOJO, the programming network of the iN DEMAND venture owned by Defendants. WealthTV contends that MOJO was launched as a new channel in May 2007 with a target demographic and programming that improperly duplicated WealthTV. Defendants thereafter allegedly refused to carry WealthTV in order to protect the performance of its allegedly similar MOJO network.

231. WealthTV has failed to meet its burden of establishing any basis for an inference of discrimination. There is no evidence that MOJO was predicated in any way on WealthTV; rather, it was an evolution and re-branding of the existing iN DEMAND network INHD, which like MOJO had always focused on serving males aged 18-49.⁴⁵⁴ Furthermore, Defendants have conclusively demonstrated at trial that there is little similarity between

⁴⁵³ Hearing Tr. 3840:16 – 3841:13 (McGovern).

⁴⁵⁴ As David Asch explained, the male 18-49 year-old demographic is a general industry description recognized by Nielsen for advertising rating purposes, and iN DEMAND used that description when describing INHD/MOJO's target demographics to advertisers, among others. *See* Hearing Tr. 4297:9-4298:2, 4362:22-4365:18 (Asch). iN DEMAND also sometimes described INHD/MOJO's demographic as males aged 25-49 to emphasize that it did not appeal primarily to males aged 18-24. *Id.*

WealthTV and MOJO in terms of programming, marketing, viewers, or target demographics.

WealthTV's witnesses, including its programming expert, Sandra McGovern, have neither proven their purported inference nor rebutted Defendants' evidentiary record.

A. History And Purpose Of MOJO

(a) The emergence of HD programming

232. In the early 2000s, HD programming, which has a picture and sound quality that is far superior to analog programming, began to emerge in the United States.⁴⁵⁵ HD programming was expensive, however, both for programmers to produce and for consumers to receive.⁴⁵⁶ For programmers, special equipment was required for the production of programming in the HD format, and in 2002 and 2003 such equipment was expensive.⁴⁵⁷ Special equipment also was required for consumers to view programming in HD, and HD television sets cost thousands of dollars.⁴⁵⁸

233. In 2002 and 2003, very few consumers had television sets that were capable of displaying HD content.⁴⁵⁹ Only the "early adopters" of HD technology were spending the money to purchase HD television sets, and the primary demographic of these purchasers was males aged 18-49 with some amount of disposable income.⁴⁶⁰

⁴⁵⁵ See Cox Ex. 84, Asch Dir. Test. ¶ 8; Cox Ex. 79, Wilson Dir. Test. ¶ 24; Hearing Tr. 4290:9-4291:11 (Asch).

⁴⁵⁶ *Id.*

⁴⁵⁷ Cox Ex. 84, Asch Dir. Test. ¶ 8; Hearing Tr. 4291:1-4 (Asch).

⁴⁵⁸ Cox Ex. 84, Asch Dir. Test. ¶ 8; *see also* Cox Ex. 79, Wilson Dir. Test. ¶ 24; Hearing Tr. 4291:4-6 (Asch).

⁴⁵⁹ Cox Ex. 84, Asch Dir. Test. ¶ 11.

⁴⁶⁰ *Id.*; *see also* Cox Ex. 79, Wilson Dir. Test ¶ 28; TWC Ex. 81, Witmer Dir. Test. ¶ 16.

234. At the time, very little HD programming was available for cable operators to provide to their early-adopting customers.⁴⁶¹ It was widely expected, however, that existing cable programming networks with established name brands and audience bases would eventually develop HD versions of their existing channels and that their established audiences would desire those HD channels as they switched to HD-capable television sets.⁴⁶²

235. During this time, other MVPDs, including the DBS providers, were developing their own capabilities to distribute HD content, and some were using HD channels to showcase the HD format.⁴⁶³

(b) iN DEMAND created INHD and INHD2 to meet the owners' business needs

236. In 2002 and 2003, in response to the evolving HD technology and marketplace forces, the management of iN DEMAND proposed the creation of two channels, INHD and INHD2, as showcase channels for HD programming to assist the Owners in meeting the business need for more HD content and an HD platform.⁴⁶⁴

237. iN DEMAND was able to provide these two HD channels efficiently for several reasons.⁴⁶⁵ Its primary business was licensing and aggregating programming on a variety

⁴⁶¹ Cox Ex. 84, Asch Dir. Test. ¶ 12; *see also* Cox Ex. 79, Wilson Dir. Test. ¶¶ 26, 28; TWC Ex. 81, Witmer Dir. Test. ¶ 16; Comcast Ex. 3, Bond Dir. Test. ¶ 17; Hearing Tr. 4870:11-13 (Wilson).

⁴⁶² Cox Ex. 84, Asch Dir. Test. ¶¶ 13-14; *see also* Cox Ex. 79, Wilson Dir. Test. ¶ 27; TWC Ex. 81, Witmer Dir. Test. ¶ 17; Comcast Ex. 3, Bond Dir. Test. ¶ 17.

⁴⁶³ Cox Ex. 84, Asch Dir. Test. ¶ 16; *see also* Cox Ex. 79, Wilson Dir. Test ¶ 29; Hearing Tr. 4877:19-4878:9 (Wilson).

⁴⁶⁴ *See* Cox Ex. 84, Asch Dir. Test. ¶¶ 17-18; Cox Ex. 79, Wilson Dir. Test. ¶ 31; TWC Ex. 81, Witmer Dir. Test. ¶ 16; Hearing Tr. 4292:10-22, 4307:22-4308:8, 4344:7-10 (Asch), 4878:10-4879:13, 4883:2-20 (Wilson).

⁴⁶⁵ *See* Hearing Tr. 4293:1-21 (Asch).

of platforms, and iN DEMAND already made HD programming available to the Owners through its pay-per view and VOD services.⁴⁶⁶ iN DEMAND also had other resources available, such as satellite transponder space, which minimized the technical challenges involved in launching the channels.⁴⁶⁷ iN DEMAND personnel also had experience in both the aggregation of programming content and the development of a programming network.⁴⁶⁸

238. INHD and INHD2 were designed to appeal to the early adopters of HD technology, males aged 18-49 with some amount of disposable income.⁴⁶⁹ Much of the HD programming that was available at the time — sports, action movies and special events — appealed to that same demographic.⁴⁷⁰ Accordingly, from the very beginning, iN DEMAND acquired HD programming for INHD and INHD2 that would appeal to this demographic, focusing on a steady diet of sports, action movies, rock concerts and similar events.⁴⁷¹ At the same time, iN DEMAND made a deliberate decision not to target a highly-affluent demographic.⁴⁷²

⁴⁶⁶ Cox Ex. 84, Asch Dir. Test. ¶¶ 18, 20; Hearing Tr. 4293:1-18 (Asch).

⁴⁶⁷ Cox Ex. 84, Asch Dir. Test. ¶ 20; Hearing Tr. 4293:1-8 (Asch).

⁴⁶⁸ See Hearing Tr. 4875:20-4876:19 (Wilson) (in 2003, iN DEMAND was run by Steve Brenner, who had extensive experience at USA Network, a highly-branded linear video network), 4889:9-21, 4929:13-4930:4.

⁴⁶⁹ Cox Ex. 84, Asch Dir. Test. ¶¶ 18, 21; *see also* Cox Ex. 79, Wilson Dir. Test. ¶ 32; TWC Ex. 81, Witmer Dir. Test. ¶ 16; Hearing Tr. 4294:16-19, 4296:17-4297:8, 4362:21-4363:16 (Asch), 4883:2-20 (Wilson).

⁴⁷⁰ Cox Ex. 84, Asch Dir. Test. ¶¶ 18, 21; *see also* TWC Ex. 81, Witmer Dir. Test. ¶ 16.

⁴⁷¹ Cox Ex. 84, Asch Dir. Test. ¶ 22; Hearing Tr. 4299:3-4300:12 (Asch).

⁴⁷² Cox Ex. 84, Asch Dir. Test. ¶¶ 23-24; Cox Ex. 39; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Hearing Tr. 4295:7-4296:5 9 (Asch).

239. While INHD and INHD2 supplied the Owners with two channels of HD content on a 24-hour per day, seven-day per week basis, each of the Owners had the right to preempt the programming supplied by iN DEMAND to display HD programming that the Owner had licensed on its own.⁴⁷³ This right was important to the Owners because it ensured a steady stream of HD content for their customers while providing each Owner with the flexibility to obtain and display regional or local HD content, such as sports programming.⁴⁷⁴ Each Owner frequently exercised its right to preempt programming on INHD and INHD2 over the years.⁴⁷⁵

240. The Owners viewed INHD and INHD2 as temporary and believed the channels would eventually be replaced by HD feeds of existing SD networks and existing analog networks such as ESPN, Discovery and TNT.⁴⁷⁶

241. In September 2003, INHD and INHD2 launched, and the Owners began carrying them shortly thereafter.⁴⁷⁷ Each Owner made INHD and INHD2 available only to its

⁴⁷³ See Cox Ex. 84, Asch Dir. Test. ¶¶ 18, 27, 68; Cox Ex. 79, Wilson Dir. Test. ¶ 33; Hearing Tr. 4307:22-4310:10 (Asch), 4878:13-4879:6 (Wilson).

⁴⁷⁴ See Cox Ex. 79, Wilson Dir. Test. ¶ 33; Comcast Ex. 3, Bond Dir. Test ¶ 17.

⁴⁷⁵ Cox Ex. 79, Wilson Dir. Test ¶¶ 75, 167-70; Hearing Tr. 4308:16-4310:7 (Asch).

⁴⁷⁶ Cox Ex. 79, Wilson Dir. Test. ¶ 34; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Cox Ex. 84, Asch Dir. Test. ¶ 28; Comcast Ex. 3, Bond Dir. Test. ¶ 17; Hearing Tr. 4310:11-4311:4, 4406:22-4407:3 (Asch), 4873:11-4874:3 (Wilson).

⁴⁷⁷ Cox Ex. 84, Asch Dir. Test. ¶ 19; Cox Ex. 79, Wilson Dir. Test. ¶ 35; TWC Ex. 81, Witmer Dir. Test. ¶ 16.

HD subscribers, *i.e.*, subscribers that had HD tuners in their cable set-top boxes.⁴⁷⁸ The Owners' digital subscribers without HD tuners were not provided access to INHD or INHD2.⁴⁷⁹

242. The Owners funded INHD and INHD2 by paying carriage fees to iN DEMAND so that it would have the funds necessary to acquire and produce content and otherwise conduct the business of running INHD and INHD2.⁴⁸⁰ The carriage fees paid by the Owners to iN DEMAND for INHD and INHD2 were established at a level sufficient to cover the costs of developing and running the channels; the fees were not designed to produce profits for iN DEMAND or the Owners.⁴⁸¹

243. iN DEMAND originally calculated the fees based on each Owner's number of digital subscribers, because when the channels launched in 2003 the number of HD subscribers was so low that a per-HD subscriber charge would have distorted the costs.⁴⁸²

(c) The Re-branding of INHD as MOJO

244. In 2004, without direction from the Board of Directors, iN DEMAND management decided to conduct market research to determine how better to serve the existing viewers of INHD and INHD2 and how to maximize the value of the channels to the Owners.⁴⁸³

⁴⁷⁸ Cox Ex. 79, Wilson Dir. Test. ¶ 36; Hearing Tr. 4333:6 (Asch), 4998:9-14 (Wilson); *see also* Hearing Tr. 4573:4-10 (Bond).

⁴⁷⁹ Cox Ex. 79, Wilson Dir. Test. ¶ 36; *see also* Hearing Tr. 4573:4-10 (Bond).

⁴⁸⁰ Cox Ex. 79, Wilson Dir. Test. ¶ 37.

⁴⁸¹ *Id.* ¶ 37; Cox Ex. 84, Asch Dir. Test ¶ 80.

⁴⁸² Cox Ex. 84, Asch Dir. Test. ¶ 80; Cox Ex. 79, Wilson Dir. Test. ¶ 38; Hearing Tr. 4334:21-4335:8 (Asch), 4998:3-4999:6 (Wilson).

⁴⁸³ Cox Ex. 84, Asch Dir. Test. ¶ 31; *see also* Cox Ex. 79, Wilson Dir. Test. ¶ 104; TWC Ex. 12 (Magid studies excerpts describing demographics).

The research confirmed that INHD viewers were overwhelmingly young, male, and had incomes in excess of \$75,000 per year.⁴⁸⁴ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁴⁸⁵ [END HIGHLY CONFIDENTIAL]

245. The research also revealed a split in the interests of the channels' audience between heavy sports enthusiasts and non-sports fans.⁴⁸⁶ The sports fans wanted more HD sports and other competitive events, and the non-sports fans wanted more content that highlighted the HD format, including movies and concerts.⁴⁸⁷

246. This research led iN DEMAND to develop a branding strategy for INHD and INHD2 that would create a brand identity that better defined the channels as a destination for their existing young affluent male demographic.⁴⁸⁸ This process was not the creation of a new network, but rather an incremental process of making the existing channels more appealing to their existing audience.⁴⁸⁹

⁴⁸⁴ Cox Ex. 84, Asch Dir. Test. ¶ 32; TWC Ex. 12; Hearing Tr. 4316:1-4317:17, 4326:1-4327:1 (Asch).

⁴⁸⁵ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Hearing Tr. 4312:6-18, 4326:8-4327:1 (Asch).

⁴⁸⁶ Cox Ex. 84, Asch Dir. Test. ¶ 34.

⁴⁸⁷ *Id.*

⁴⁸⁸ Cox Ex. 84, Asch Dir. Test. ¶¶ 33, 35, 36; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Hearing Tr. 4326:8-4327:20 (Asch).

⁴⁸⁹ Cox Ex. 84, Asch Dir. Test. ¶ 36, 37, 38; Hearing Tr. 4329:22-4330:12, 4388:10-4389:13, 4390:5-4392:10 (Asch).

247. In 2004 and 2005, iN DEMAND developed re-branding plans for both INHD and INHD2, which were presented for the first time to the iN DEMAND Board of Directors on January 18, 2006.⁴⁹⁰

248. The iN DEMAND Board rejected management's proposal to re-brand both INHD and INHD2.⁴⁹¹ The Owners decided that a second HD showcase channel was no longer necessary and that their bandwidth could be better used to carry other newly available HD content.⁴⁹²

249. On June 20, 2006, the Owners made the final decision to shut down INHD2 because they needed the bandwidth for other HD channels.⁴⁹³ INHD2 went dark on December 31, 2006.⁴⁹⁴

250. Although iN DEMAND management's plans to re-brand INHD2 were frustrated by the Owners' decision to terminate that channel, iN DEMAND management proceeded with its idea for re-branding INHD as MOJO.⁴⁹⁵ iN DEMAND management's strategy for the re-branding of INHD as MOJO included maintaining the vast majority of

⁴⁹⁰ Cox Ex. 84, Asch Dir. Test. ¶¶ 45, 46; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Cox Ex. 79, Wilson Dir. Test. ¶ 105; Hearing Tr. 4327:2-4328:8 (Asch).

⁴⁹¹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] *see also* Cox Ex. 79, Wilson Dir. Test. ¶¶ 107, 109; Hearing Tr. 4328:6-4329:3 (Asch).

⁴⁹² [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] *see also* Cox Ex. 79, Wilson Dir. Test. ¶¶ 106, 108; Cox Ex. 15; Hearing Tr. 4328:6-4329:3 (Asch).

⁴⁹³ Cox Ex. 84, Asch Dir. Test. ¶ 52.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* ¶ 48.

existing INHD programming, introducing a block of new programming that would be marketed as MOJO programming, marketing the MOJO concept to advertisers, and eventually renaming INHD as MOJO.⁴⁹⁶ iN DEMAND planned to accomplish the re-branding over a period of approximately a year.⁴⁹⁷

251. iN DEMAND management's re-branding strategy involved the introduction of some new original programming, but iN DEMAND did not alter the vast majority of INHD's programming schedule when it introduced the MOJO branded programming or when it re-branded the entire channel as MOJO.⁴⁹⁸

252. On June 18, 2006, iN DEMAND introduced a block of original programming called the "MOJO Block" on INHD.⁴⁹⁹ The "MOJO Block" was a three-hour schedule of programming that aired on INHD during prime time hours and was rebroadcast at different times during each week.⁵⁰⁰ iN DEMAND used a standard industry process called "nesting" for the "MOJO Block," in which the concept was introduced on the INHD network to

⁴⁹⁶ Cox Ex. 84, Asch Dir. Test. ¶¶ 48-49; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] *see also* Cox Ex. 79, Wilson Dir. Test. ¶ 110.

⁴⁹⁷ Cox Ex. 84, Asch Dir. Test. ¶ 49; Hearing Tr. 4329:22-4330:12 (Asch).

⁴⁹⁸ Cox Ex. 84, Asch Dir. Test. ¶ 49, 55; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Cox Ex. 79, Wilson Dir. Test. ¶ 128; Hearing Tr. 4402:7-4403:4 (Asch).

⁴⁹⁹ Cox Ex. 84, Asch Dir. Test. ¶ 50; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] Cox Ex. 79, Wilson Dir. Test. ¶¶ 110-111; Hearing Tr. 4329:6-21 (Asch).

⁵⁰⁰ Cox Ex. 84, Asch Dir. Test. ¶ 51; Hearing Tr. 4329:11-21 (Asch).

create a following for the MOJO brand before iN DEMAND re-branded the entire channel as MOJO.⁵⁰¹

253. The airing of original programs on MOJO was part of the re-branding of INHD as MOJO; it was not the launch of a new network.⁵⁰² INHD had begun offering original programs, with some airing as early as mid-2004, and many of these original programs continued to be offered after the introduction of the “MOJO Block.”⁵⁰³ Moreover, a substantial majority of the programming appearing on MOJO — sports, movies and music — was the type of programming that had always been on INHD.⁵⁰⁴

254. On May 1, 2007, after the “MOJO Block” had been nested on INHD for almost a year, the name change of INHD to MOJO became official.⁵⁰⁵

(d) The transition from INHD to MOJO was a re-branding, not a new channel launch

255. The MOJO re-branding was never presented as a new launch or a new channel to the Owners, and the Owners did not consider their acquiescence in the change to be approval for launch of a new network.⁵⁰⁶ The Owners understood that the re-branding of INHD, first to include the “MOJO Block” and then to adopt the name MOJO, did not reflect a material change in content, but instead was intended to re-name the channel to allow iN DEMAND to

⁵⁰¹ Cox Ex. 84, Asch Dir. Test. ¶¶ 50, 51; Hearing Tr. 4329:11-16 (Asch).

⁵⁰² Cox Ex. 84, Asch Dir. Test. ¶¶ 55-58; *see also* Hearing Tr. 3972:17-3973:21 (Witmer).

⁵⁰³ Cox Ex. 84, Asch Dir. Test. ¶ 57; *see also* Hearing Tr. 4323:19-4326:7 (Asch).

⁵⁰⁴ Cox Ex. 84, Asch Dir. Test. ¶ 56.

⁵⁰⁵ *Id.* ¶ 55; Hearing Tr. 4331:3-7 (Asch).

⁵⁰⁶ *See* Cox Ex. 79, Wilson Dir. Test. ¶ 115; Hearing Tr. 4956:1-4957:13, (Wilson), 3972:17-3973:12 (Witmer).

market the channel more effectively to the same audience.⁵⁰⁷ The re-branding initiative was not intended to create or develop a new network, and the iN DEMAND Board never approved the creation or development of a new network.⁵⁰⁸

256. The programming and demographic focus of INHD also did not change when it was re-branded as MOJO. Throughout its history, INHD/MOJO always remained targeted at the same demographic: males aged 18-49 with some amount of disposable income.⁵⁰⁹

257. INHD and INHD2 were launched at a time when there was little HD content available.⁵¹⁰ As a result, in the beginning, to ensure that it had enough programming to fill the channels on a 24/7 basis, iN DEMAND aired some programming that was not deemed of high appeal to its target demographic.⁵¹¹ As it acquired and developed more HD programming that appealed to its target audience, it retired the programming that did not.⁵¹²

⁵⁰⁷ See Cox Ex. 79, Wilson Dir. Test. ¶ 127; Comcast Ex. 3, Bond Dir. Test. ¶ 17; Hearing Tr. 4326:8-4327:1, 4329:22-4330:12, 4337:14-18, 4339:19-4341:14, 4345:16-4346:16, 4390:5-4392:10 (Asch), 4956:1-4958:21, 4962:9-4963:13 (Wilson).

⁵⁰⁸ See Cox Ex. 79, Wilson Dir. Test. ¶ 127; Hearing Tr. 4412:9-12 (Asch), 3971:10-3973:16 (Witmer).

⁵⁰⁹ Cox Ex. 84, Asch Dir. Test. ¶ 59; TWC Ex. 81, Witmer Dir. Test. ¶ 36; Hearing Tr. 4316:1-4317:17, 4330:6, 4346:1-16, 4362:21-4371:3, 4403:5-4405:15 (Asch); *see also* Proposed Findings of Fact, *supra*, at ¶ 231.

⁵¹⁰ See Cox Ex. 84, Asch Dir. Test. ¶ 12; TWC Ex. 81, Witmer Dir. Test. ¶ 16; Comcast Ex. 3, Bond Dir. Test. ¶ 17; Hearing Tr. 4292:14-4300:18 (Asch).

⁵¹¹ See Hearing Tr. 4300:13-4301:6 (Asch).

⁵¹² See Cox Ex. 84, Asch Dir. Test. ¶ 59; Hearing Tr. 4301:7-18, 4302:16-20, 4339:19-4341:14, 4345:16-4347:18, 4397:14-4402:6 (Asch).

258. The development of MOJO followed a common industry practice of evolving a channel through re-branding, rather than launching a new network.⁵¹³ iN DEMAND's strategy for transitioning INHD to MOJO has been common in the cable industry for years.⁵¹⁴ As TWC's cable programming expert Michael Egan testified, many popular networks have identified a core demographic and then introduced original programming and, in many cases, a new or modified name, to better focus on serving that demographic.⁵¹⁵ INHD/MOJO is an example of this type of re-branded network.⁵¹⁶ Other examples of re-branding include TLC (formerly The Learning Channel) and WE (formerly Romance Classics).⁵¹⁷ On the other hand, many channels have thoroughly re-launched themselves by entirely changing the program mix and demographic focus of their channel.⁵¹⁸ Examples include ABC Family (formerly the Christian Broadcasting Network), the Hallmark Channel (formerly Faith & Values TV), and Spike (formerly The Nashville Network and The National Network).⁵¹⁹

259. There was no substantial shift in the programming that was shown on INHD as compared to the programming shown on MOJO after the network's name change.⁵²⁰ Mr. Egan

⁵¹³ See TWC Ex. 85, Egan Dir. Test. ¶¶ 24-30; see also Cox Ex. 79, Wilson Dir. Test. ¶ 115; Hearing Tr. 4937:13-15 (Wilson) (INHD and MOJO were the same); Cox Ex. 84, Asch Dir. Test. ¶¶ 53, 55.

⁵¹⁴ TWC Ex. 85, Egan Dir. Test. ¶ 25.

⁵¹⁵ *Id.*

⁵¹⁶ *Id.* ¶ 27.

⁵¹⁷ *Id.* ¶ 25.

⁵¹⁸ *Id.* ¶ 26.

⁵¹⁹ *Id.*

⁵²⁰ Cox Ex. 84, Asch Dir. Test. ¶ 58; Hearing Tr. 4402:7-4403:4 (Asch).

performed a separate genre analysis to compare the programming on MOJO with that of INHD. His analysis revealed substantial overlap between the two: the programming on both INHD and MOJO fell predominantly into four genres — sports, movies, music and documentary.⁵²¹ Moreover, based upon his independent work and programming and research studies that had been performed for iN DEMAND over the years, Mr. Egan concluded that both INHD and MOJO attracted primarily the same male audience between the ages of 25 and 49.⁵²²

260. Accordingly, Mr. Egan confirmed the testimony of Defendants' witnesses that MOJO was not a new channel but in fact was simply a re-branding and evolution of the existing channel INHD.⁵²³

(e) iN DEMAND never considered WealthTV during the re-branding process

261. iN DEMAND did not copy WealthTV when it developed MOJO.⁵²⁴

262. During the entire research and re-branding effort concerning INHD and INHD2 between 2003 and 2007, iN DEMAND did not consider or discuss WealthTV.⁵²⁵ WealthTV was never identified as a competitor to INHD/MOJO in any of iN DEMAND's research, despite iN DEMAND's efforts to locate all competitive networks.⁵²⁶ Members of the MOJO creative team

⁵²¹ TWC Ex. 85, Egan Dir. Test. ¶ 27; TWC Ex. 1; TWC Ex. 2; TWC Ex. 19; TWC Ex. 20.

⁵²² TWC Ex. 85, Egan Dir. Test. ¶¶ 28-29; Hearing Tr. 5184:16-5189:18 (Egan); TWC Ex. 12.

⁵²³ TWC Ex. 85, Egan Dir. Test. ¶ 30.

⁵²⁴ Cox Ex. 84, Asch Dir. Test. ¶ 59; Comcast Ex. 3, Bond Dir. Test. ¶¶ 17, 24; Hearing Tr. 4333:7-4334:4 (Asch), 4085:19-4086:14 (Witmer).

⁵²⁵ Cox Ex. 84, Asch Dir. Test. ¶¶ 40, 43, 59; Cox Ex. 79, Wilson Dir. Test. ¶ 130; Comcast Ex. 3, Bond Dir. Test. ¶¶ 17, 24; Hearing Tr. 4404:16-4405:20 (Asch).

⁵²⁶ Cox Ex. 84, Asch Dir. Test. ¶¶ 40-44; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

were not aware of WealthTV and had not seen any WealthTV programming or materials when they developed MOJO.⁵²⁷

263. iN DEMAND management never discussed WealthTV with the Board in connection with the strategic direction or development of INHD/MOJO.⁵²⁸ Management described its plans to re-brand INHD as MOJO in two separate Board presentations in October 2006 and February 2007, and neither mentions WealthTV.⁵²⁹

264. The iN DEMAND Board never discussed WealthTV and never compared WealthTV to MOJO or viewed them as competitors.⁵³⁰ The Owners' representatives who served on iN DEMAND's Board never heard any employee or officer of iN DEMAND suggest that MOJO should emulate any content on WealthTV, and they are not aware of any discussions of WealthTV among the management or employees of iN DEMAND.⁵³¹

(f) The Owners had no involvement in the re-branding process

265. There was never any discussion of having the iN DEMAND Owners take any action to assist the re-branding of MOJO or the success of that network.⁵³² The Owners had no involvement in developing iN DEMAND's strategy for re-branding INHD as MOJO.⁵³³ The

⁵²⁷ Cox Ex. 84, Asch Dir. Test. ¶¶ 40, 42-43, 59; Hearing Tr. 4405:5-20 (Asch).

⁵²⁸ Cox Ex. 84, Asch Dir. Test. ¶¶ 40-43.

⁵²⁹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

⁵³⁰ Cox Ex. 79, Wilson Dir. Test. ¶ 129.

⁵³¹ See Cox Ex. 79, Wilson Dir. Test. ¶ 130; TWC Ex. 81, Witmer Dir. Test. ¶ 35; Comcast Ex. 3, Bond Dir. Test. ¶ 24.

⁵³² Cox Ex. 84, Asch Dir. Test. ¶ 41; see also Cox Ex. 79, Wilson Dir. Test. ¶ 112.

⁵³³ See Cox Ex. 79, Wilson Dir. Test. ¶ 125.

Owners did not provide iN DEMAND's management with any input concerning the MOJO concept or how the re-branding might be achieved.⁵³⁴

266. During the entire research and re-branding effort concerning INHD and INHD2 between 2003 and 2007, no Owner ever directed iN DEMAND to copy, emulate, or consider WealthTV in any way in the acquisition, creation, or modification of INHD/MOJO programming.⁵³⁵

(g) The Owners terminated MOJO in 2008 because it no longer had a business justification

267. In 2008, the Owners considered whether to continue to operate MOJO or to shut down the network.⁵³⁶

268. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]⁵³⁷

269. [REDACTED]

[REDACTED]

[REDACTED]⁵³⁸ [REDACTED]

⁵³⁴ See Cox Ex. 79, Wilson Dir. Test. ¶ 115; Hearing Tr. 4333:19-4334:4 (Asch).

⁵³⁵ Cox Ex. 84, Asch Dir. Test. ¶ 41; *see also* Cox Ex. 79, Wilson Dir. Test. ¶¶ 115, 125, 130; Comcast Ex. 3, Bond Dir. Test. ¶ 24.

⁵³⁶ Cox Ex. 84, Asch Dir. Test. ¶ 84; *see also* Cox Ex. 79, Wilson Dir. Test. ¶ 144; TWC Ex. 81, Witmer Dir. Test. ¶ 36; Comcast Ex. 3, Bond Dir. Test. ¶¶ 18-20; Hearing Tr. 4948:6-15 (Asch), 4691:2-4693:20 (Bond).

⁵³⁷ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

⁵³⁸ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

[REDACTED]

[REDACTED]⁵³⁹ [END

HIGHLY CONFIDENTIAL] The Owners wanted to use the bandwidth that MOJO was occupying to carry HD simulcasts of existing channels that they already carried, which had well-established brands and audiences.⁵⁴⁰

270. The majority of Owners also believed that, notwithstanding management projections, INHD/MOJO's viewership was low and did not justify the cost of carriage.⁵⁴¹

271. The Board agreed to shut down MOJO, and MOJO later went dark on December 1, 2008.⁵⁴²

B. WealthTV And MOJO Featured Programming That Was Not Substantially Similar

272. WealthTV attempted at trial to portray as similar the programming of WealthTV and MOJO by carefully self-selecting snippets of WealthTV programming that, it argues, appeal to the same male demographic as MOJO. WealthTV introduced into evidence only a few "screen shots" of scenes from certain programs, and Charles Herring provided only

⁵³⁹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

⁵⁴⁰ Cox Ex. 84, Asch Dir. Test. ¶ 87; TWC Ex. 81, Witmer Dir. Test. ¶ 36; Hearing Tr. 4341:20-4342:14 (Asch).

⁵⁴¹ Cox Ex. 84, Asch Dir. Test. ¶ 90; [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL] TWC Ex. 81, Witmer Dir. Test. ¶ 36.

⁵⁴² Cox Ex. 84, Asch Dir. Test. ¶¶ 89, 91; Cox Ex. 79, Wilson Dir. Test. ¶ 161; TWC Ex. 81, Witmer Dir. Test. ¶ 36; Comcast Ex. 3, Bond Dir. Test. ¶ 20; Hearing Tr. 4341:15-19 (Asch).

certain male-skewed shows to WealthTV’s programming expert for review.⁵⁴³ But at no point did WealthTV offer a representative picture of the programming on its network, much less any empirical or quantitative expert opinion that could support a finding of substantial similarity between the programming of WealthTV and MOJO. Defendants, by contrast, introduced compelling evidence of the differences in programming between the two networks.

273. Michael Egan, TWC’s expert in programming analysis, testified that “picking out isolated shows” to draw comparisons is “a futile exercise.”⁵⁴⁴ Instead, Mr. Egan performed a comprehensive study of the programming on WealthTV and MOJO. In conducting his work, Mr. Egan viewed nearly two weeks of WealthTV primetime programming, DVDs of 34 individual WealthTV shows, multiple Internet clips and a sizzle reel of WealthTV programming. In total, Mr. Egan watched some 90 different episodes of 30 different WealthTV shows. He also watched multiple hours of MOJO primetime programming, 15 individual MOJO shows and additional programming found on the MOJO website, You Tube, MOJO sizzle reels and other sources. In addition, Mr. Egan reviewed programming schedules and descriptions, audience research data, marketing materials and the websites of both networks to reach his conclusions as to the similarities and differences between the two networks.⁵⁴⁵

274. First, Mr. Egan performed a “genre analysis” of the programming on WealthTV and MOJO during two sample weeks in July 2007 and December – January 2007-08. By utilizing a genre analysis, Mr. Egan could gain an understanding of the entire programming

⁵⁴³ See, e.g., WTV Exs. 6-11 (screen shots from selected WealthTV programs); *see also* Hearing Tr. 3813:9-3827:11 (McGovern) (describing the shows that Mr. Herring did not provide for Ms. McGovern’s review).

⁵⁴⁴ Hearing Tr. 5168:16-5169:11 (Egan).

⁵⁴⁵ TWC Ex. 85, Egan Dir. Test. ¶ 6; Hearing Tr. 5170:2-5171:2, 5173:7-5175:15 (Egan).

schedule of WealthTV and MOJO for a given time period.⁵⁴⁶ For both of the sample weeks he studied, Mr. Egan categorized every program aired into genres (*e.g.*, movies, sports, etc.) based on a methodology derived from his thirty years in the cable programming business. Once categorized, Mr. Egan compiled the hours that each genre was broadcast on each channel and ranked the results.⁵⁴⁷

275. Mr. Egan determined that the five most common genres of programming featured on WealthTV (comprising 60% of the hours surveyed) were Travel & Recreation, Lifestyle, Food & Drink, Documentary, and Art, Design & Collectibles. In contrast, the five most common genres of programming on MOJO (comprising 77% of the hours surveyed) were Sports, Music, Movies, Documentary, and Reality.⁵⁴⁸ Mr. Egan further determined that WealthTV featured a small percentage (13%) of Sports, Music, Movies, and Reality programming, while MOJO featured a small percentage (19%) of Travel & Recreation, Lifestyle, Food & Drink, or Art, Design & Collectibles programming. Thus, Mr. Egan concluded that there was little overlap in genres.⁵⁴⁹

276. To confirm his conclusions, Mr. Egan performed a similar analysis with respect to the first installment of programming provided by WealthTV to TWC's San Antonio system in connection with the 2007 VOD pilot trial. WealthTV's programs included shows about shopping, Andy Warhol, and Cher's wardrobe. Of the nine genres represented by these

⁵⁴⁶ Hearing Tr. 5168:16-5169:11 (Egan).

⁵⁴⁷ TWC Ex. 67; TWC Ex. 85, Egan Dir. Test. ¶¶ 6, 8-9; Hearing Tr. 5168:12-5171:2 (Egan).

⁵⁴⁸ TWC Ex. 85, Egan Dir. Test. ¶ 10; *see also* TWC Ex. 54; TWC Ex. 71.

⁵⁴⁹ TWC Ex. 85, Egan Dir. Test. ¶¶ 8-11; Hearing Tr. 5168:4-8 (Egan).

first nineteen WealthTV programs provided to TWC, only three genres were represented on MOJO, accounting for just 16% of its air time.⁵⁵⁰

277. Mr. Egan then also performed a genre analysis comparing WealthTV's programming to those of several other networks with programming that appeared to be much more similar to WealthTV's than MOJO's. He concluded that several of the dominant genres on Fine Living, Food Network and American Life TV were the same as the top five genres on WealthTV.⁵⁵¹ Indeed, although Charles Herring takes pains in his written testimony to distinguish the Fine Living network from WealthTV,⁵⁵² Mr. Egan's analysis of a week of respective programming in late 2008/early 2009 reveals that Fine Living and WealthTV each share three of their top five genres (Travel & Recreation, Lifestyle and Food & Drink), while none of those three genres are included in MOJO's top five.⁵⁵³

278. Based on his various genre analyses alone, Mr. Egan concludes that WealthTV could not have served as a model for MOJO.⁵⁵⁴

C. WealthTV and MOJO Had A Different Overall "Look and Feel"

279. To complement his genre analyses, Mr. Egan also compared the overall "look and feel" of WealthTV and MOJO. Mr. Egan testified that "look and feel" is an industry

⁵⁵⁰ TWC Ex. 85, Egan Dir. Test. ¶¶ 12-13.

⁵⁵¹ *Id.* ¶ 18.

⁵⁵² WTV Ex. 144, Herring Dir. Test. at 10-11.

⁵⁵³ TWC Ex. 85, Egan Dir. Test. ¶ 19; TWC Ex. 2; TWC Ex. 58; TWC Ex. 59.

⁵⁵⁴ TWC Ex. 85, Egan Dir. Test. ¶ 13.

phrase that describes the essential personality of a network conveyed by its visuals, subject matter, on-air personalities, music, graphics and other factors.⁵⁵⁵

280. Based on the voluminous programming he watched, Mr. Egan concluded that the look and feel of WealthTV and MOJO are “nothing alike.”⁵⁵⁶ He determined MOJO’s look and feel to be “hip, urban, irreverent, aggressive, and edgy,” not unlike “the personality of a cocky, young adult male.”⁵⁵⁷ The hosts were irreverent and sarcastic, the music was loud, the subject matter focused on sports and music and it had a youthful feel.⁵⁵⁸ By contrast, WealthTV “convey[ed] a calmer, more mature attitude, executed via traditional broadcast television’s orderly progression through the linear narrative arc of a shot, to a commercial break and back again.”⁵⁵⁹ Mr. Egan further testified that MOJO’s programs “change scenes suddenly, and so forth, so it feels a lot like an MTV channel[,]” while WealthTV “progresses from one scene to the next as you typically would expect” and uses mostly “library” background music.⁵⁶⁰

281. WealthTV has introduced into evidence selected “screen shots” of certain of its programs to give the impression that its programming was more youthful and prurient than Mr. Egan opines. Charles Herring, however, ultimately admitted that many of those screen shots were not representative of WealthTV’s programming and would not give someone an accurate

⁵⁵⁵ Hearing Tr. 5172:2-5173:6 (Egan).

⁵⁵⁶ *Id.* at 5175:16-5177:6 (Egan).

⁵⁵⁷ TWC Ex. 85, Egan Dir. Test. ¶ 14.

⁵⁵⁸ Hearing Tr. 5175:16-5177:6 (Egan).

⁵⁵⁹ TWC Ex. 85, Egan Dir. Test. ¶ 14.

⁵⁶⁰ Hearing Tr. 5175:16-5177:6 (Egan).

impression of the look and feel of WealthTV.⁵⁶¹ And Mr. Herring’s trial testimony is contradicted directly by his prior sworn testimony in WealthTV’s litigation with its former head of affiliate sales, Donna Thomas, in which he claimed that WealthTV “has a family-friendly appeal . . . if somebody is looking for a lot of flesh or a lot of bikinis or flesh, we really try to avoid that component.”⁵⁶²

282. In its Complaint, WealthTV identified five pairs of shows on WealthTV and MOJO that it contended demonstrated the similarity between the networks. Mr. Egan accordingly undertook an analysis of those sets of five shows as well. Mr. Egan’s analysis demonstrates that none of the five MOJO shows identified by WealthTV — “Uncorked,” “Test Drive,” “Timeless,” “After Hours,” or “Geared Up” — bears any similarity to the respective WealthTV program that WealthTV alleges MOJO copied — “Taste! The Beverage Show,” “Wealth on Wheels,” “Charlie Jones, Live to Tape,” “Taste of Life,” and “Innov8.”⁵⁶³ For example, WealthTV’s “Taste! The Beverage Show” is an informative, travel-oriented show hosted by well-dressed and earnest men and women that teaches the viewer about various beverages. MOJO’s “Uncorked,” in Mr. Egan’s expert opinion, is really a comedy hosted by a somewhat slovenly and unsophisticated comic who asks, more for comedic effect than informational value, all the “dumb” questions about wine that the viewer is too afraid to ask. Mr. Egan concludes that the two programs are entirely different in terms of look and feel.⁵⁶⁴

⁵⁶¹ WTV Exs. 10-11; Hearing Tr. 3058:17-3066:14, 3069:19-3070:4 (Herring).

⁵⁶² Hearing Tr. 3056:19-3057:5 (Herring); *see also* TWC Ex. 139 at 139-6.

⁵⁶³ TWC Ex. 85, Egan Dir. Test. ¶¶ 15-16; Hearing Tr. 5178:15-5183:21 (Egan).

⁵⁶⁴ Hearing Tr. 5179:5-5183:17 (Egan).

D. WealthTV and MOJO Targeted Different Demographics

283. As an additional purported indicia of its similarity with MOJO, WealthTV claims a target demographic of upscale males between the ages of 25 and 49, the same demographic indisputably targeted by MOJO. In support of its assertions regarding its target audience, WealthTV primarily relies upon the testimony of Charles Herring, several magazine and trade show advertisements, and a single slide from three presentations made by WealthTV in 2004.⁵⁶⁵

284. Defendants' record evidence, however, again overwhelms the anecdotal, self-selected proof relied upon by WealthTV.⁵⁶⁶ Indeed, Mr. Herring's own sworn testimony, and WealthTV's own agreements, presentations, marketing materials and websites, all plainly reveal that this alleged male target demographic was developed for purposes of this proceeding, and that WealthTV has always been designed to appeal broadly to any men and women interested in how wealth is achieved and enjoyed.

285. Mr. Herring's testimony concerning the target audience of WealthTV in this proceeding is directly contrary to his prior sworn testimony in WealthTV's litigation against

⁵⁶⁵ See, e.g., WTV Ex. 144, Herring Dir. Test. at 7-9, 11-13; WTV Exs. 1, 4, 5, 34-36 (advertisements and trade show posters); WTV Exs. 2, 117, 120, 122 (all include presentation slide depicting WealthTV as having "broad appeal skewed toward educated, high income, male"). WealthTV's expert, Sandra McGovern, also opines that WealthTV targeted this male demographic, but her opinion similarly was based on seeing this one slide that was provided to her by Mr. Herring. She was not provided with any presentations made to TWC, Cox, BHN or any other non-defendant MVPD or advertiser. Hearing Tr. 3767:3-3770:15, 3788:16-3789:2 (McGovern). Nor did she ever request research or any other support for WealthTV's position. *Id.* at 3774:4-11 (McGovern). Thus, her opinion on this issue is entitled to little weight.

⁵⁶⁶ WealthTV had also intended to bolster its claim through introduction of a "survey" of WealthTV website users, but the Presiding Judge properly refused to admit this unreliable evidence and precluded WealthTV's purported expert, Mark Kersey, from testifying about it. Hearing Tr. 3012:13-3014:4, 3699:8-3700:17 (Presiding Judge).

its former sales director, Donna Thomas. There, Mr. Herring testified that WealthTV is designed to appeal to a broad audience that in no way was limited to men between the ages of 25 and 49. Mr. Herring stated that the “programming appeals to about a 25 to 60 plus crowd . . . [and] to people that like substance in their programming.”⁵⁶⁷ He testified that WealthTV’s programming had a “vicarious aspect” to it for people who “dream about the American dream.”⁵⁶⁸ About the only people that would not be drawn to WealthTV, Mr. Herring testified, would be “monks who have taken a vow of poverty.”⁵⁶⁹ Moreover, when asked in an open-ended manner if there was anything else about WealthTV’s demographics that Mr. Herring wanted to explain, he did not say anything about WealthTV’s purported target of affluent males.⁵⁷⁰ This prior testimony, read as a whole, is irreconcilable with the claim made here that WealthTV is directed at 25- to 49-year-old men. Given this fundamental inconsistency, it is hardly surprising that Mr. Herring professed to have no recollection of his earlier testimony.⁵⁷¹

286. The contemporaneous evidence of WealthTV’s agreements, communications, marketing materials, website and other documents echoes Mr. Herring’s testimony in the Thomas case that WealthTV is designed to have a broad appeal to men and women between 25 and 60-plus years of age.

287. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

⁵⁶⁷ TWC Ex. 139; Hearing Tr. 3051:3-3054:12 (Herring).

⁵⁶⁸ TWC Ex. 139 at 139-5.

⁵⁶⁹ *Id.* at 139-6; Hearing Tr. 3055:1-12 (Herring).

⁵⁷⁰ TWC Ex. 139 at 139-6; Hearing Tr. 3054:6-3055:13 (Herring).

⁵⁷¹ Hearing Tr. 3049:15-3050:3 (Herring).

[REDACTED]

[REDACTED]

[REDACTED]⁵⁷² [REDACTED]

[REDACTED]

[REDACTED]⁵⁷³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵⁷⁴ [REDACTED]

[REDACTED]⁵⁷⁵ [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

288. WealthTV’s marketing presentations to MVPDs and advertisers also consistently highlighted WealthTV’s broad appeal. Charles Herring testified that WealthTV regularly gave presentations to MVPDs, and that he had prepared a master PowerPoint presentation with various slides that he and WealthTV sales personnel used in those presentations.⁵⁷⁶ In its presentations to MVPDs, including the Defendants, WealthTV repeatedly

⁵⁷² Hearing Tr. 3031:14-22, 3035:4-7 (Herring).

⁵⁷³ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

⁵⁷⁴ [REDACTED]

⁵⁷⁵ [REDACTED] [END HIGHLY CONFIDENTIAL]

⁵⁷⁶ WTV Ex. 144, Herring Dir. Test. at 12; Hearing Tr. 3162:7-3164:6 (Herring).

described itself as having “broad appeal” rather than as a male-skewed network or one targeting a 25- to 49-year-old male audience. WealthTV’s programming expert, Ms. McGovern, conceded that, if WealthTV in fact had a target demographic of 25- to 49-year-old males, she would have expected WealthTV to say so in its presentations to MVPDs.⁵⁷⁷ The fact that WealthTV did not so present itself is irreconcilably inconsistent with the claims it now advances.

289. Thus, in presentations to *Forbes* in 2004, to Cox in 2004 and 2005, to DirecTV in 2005, to TWC in 2006 and to Comcast in 2006, WealthTV described its programming as having “broad appeal.” Not a line in any one of those presentations stated that the network targeted men ages 25 to 49.⁵⁷⁸

290. A presentation made to ID Media in March 2007 made plain WealthTV’s true target. That presentation not only failed to describe WealthTV as being targeted to male 25- to 49-year-olds, but it specifically described WealthTV as “targeting the most affluent viewer, 25- to 60-plus, educated, *equal appeal to men and women*” (emphasis supplied).⁵⁷⁹

291. Additionally, the standard WealthTV presentation also included a “Magazine Complementary Set” intended to illustrate the magazines with overlapping appeal to WealthTV’s programs. This Complementary Set included male-skewed magazines such as *The Robb Report* but also female-skewed magazines such as *W* and *Town and Country* and magazines with no gender skew such as *The New Yorker*.⁵⁸⁰ WealthTV included this

⁵⁷⁷ Hearing Tr. 3771:9-20 (McGovern).

⁵⁷⁸ TWC Exs. 4, 9, 22; Cox Exs. 6, 23; Comcast Ex. 22; Hearing Tr. 3103:19-3104:5, 3144:7-17, 3144:22-3145:11, 3149:18-3152:5 (Herring).

⁵⁷⁹ TWC Ex. 28.

⁵⁸⁰ See, e.g., TWC Ex. 22; Hearing Tr. 3100:16-3103:2 (Herring), 3785:3-3788:15 (McGovern).

Complementary Set slide in many presentations, both to Defendants, other MVPDs and advertisers.⁵⁸¹ WealthTV's expert, Ms. McGovern, conceded that the inclusion of women's magazines in the Complementary Set is inconsistent with the claim that the network targeted a male demographic.⁵⁸²

292. In addition, WealthTV's presentations to MVPDs and advertisers typically contained several slides of "Featured Programming." As Mr. Herring conceded, many of these featured shows did not target men. To the contrary, the Featured Programming slides show that the majority of the programs that WealthTV chose to highlight did not have a male skew.⁵⁸³ For example, a presentation made to Cox in June of 2005 featured 18 shows; only five of the 18 claimed to target a male audience.⁵⁸⁴

293. The June 2005 presentation to Cox also contained a discussion of the "WealthTV Demographic."⁵⁸⁵ In this discussion, WealthTV did not describe its demographic as being exclusively or predominantly male, but rather as being those with "luxury fever," a trait that Mr. Herring admitted at trial could apply equally to men and women.⁵⁸⁶ This discussion also described WealthTV's age demographic as "Baby Boomers," a group that Mr. Herring and Ms. McGovern both conceded would include people ages 40 to 60-64, not 25 to 49.⁵⁸⁷

⁵⁸¹ See, e.g., Cox Ex. 23; TWC Ex. 9; Comcast Ex. 22; Hearing Tr. 3116:22-3118:5 (Herring).

⁵⁸² Hearing Tr. 3781:11-3782:17 (McGovern).

⁵⁸³ See, e.g., Cox Ex. 23; Hearing Tr. 3109:9-3114:22 (Herring).

⁵⁸⁴ Cox Ex. 23; Hearing Tr. 3132:5-3142:19 (Herring).

⁵⁸⁵ Cox Ex. 23.

⁵⁸⁶ *Id.*; Hearing Tr. 3118:10-3119:17 (Herring).

⁵⁸⁷ Cox Ex. 23; Hearing Tr. 3119:18-3121:6 (Herring), 3802:7-17 (McGovern).

294. The June 2005 Cox presentation also contained a demographic slide frequently employed by WealthTV. That slide broke down WealthTV's programming by genre and demographic appeal. WealthTV divided its programming into six principal genres. Wealth described five of the genres as targeted to both male and female adults of various ages. One of the genres, health, is described as primarily appealing to women, ages 25 to 54. None of the genres are described as exclusively targeting men, either age 25 to 49 or any other age.⁵⁸⁸ Mr. Herring conceded that this oft-used demographic slide is inconsistent with the claim that WealthTV skewed its programming to 25- to 49-year old men.⁵⁸⁹

295. An April 2005 WealthTV presentation to Robert Riordan of DirecTV contained not only the same slides as the Cox presentation showing the broad appeal of WealthTV, but an additional slide describing a "TV Competitive Set" showing the networks with which WealthTV had the most demographic overlap.⁵⁹⁰ These networks included The Golf Channel and CNBC, both male-skewed networks, and HGTV and BBC America, both female-skewed networks, with WealthTV positioned in between them.⁵⁹¹ Although Mr. Herring professed not to understand the slide, he conceded that this description of WealthTV's TV Competitive Set was part of a master set of slides maintained on his computer.⁵⁹² He had no choice but to make such a concession: the presentation that he sent to *Forbes* Magazine in

⁵⁸⁸ Cox Ex. 23; TWC Ex. 4 at 4-16; TWC Ex. 9 at 9-26; Hearing Tr. 3123:20-3131:5 (Herring)

⁵⁸⁹ Hearing Tr. 3129:13-3130:20 (Herring).

⁵⁹⁰ TWC Ex. 9 at 9-35; Hearing Tr. 3187:8-3190:5 (Herring).

⁵⁹¹ TWC Ex. 9 at 9-35.

⁵⁹² Hearing Tr. 3172:6-13 (Herring).

December of 2004 contained the same slide.⁵⁹³ Whatever confusion Mr. Herring claimed to have concerning the TV Competitive Set was not shared by his expert, Ms. McGovern, who testified that television competitive sets such as this tell a prospective advertiser “[t]hese are the channels with whom we have an overlapping target demographic,” and a sharing of audience.⁵⁹⁴

296. WealthTV’s other communications with Defendants are also flatly inconsistent with the claim that the network targeted 25- to 49-year-old men. For example, Mr. Herring sent a handwritten note to Bob Wilson of Cox in March of 2006 concerning “The Boomer Show.” Mr. Herring wrote that the program “will be very strong with a broad audience appeal.”⁵⁹⁵ Herring also sent an e-mail to Mickey Carter of TWC pointing out that WealthTV’s “[a]spirational broad appeal would work well in nearly all markets.”⁵⁹⁶ Indeed, Mickey Carter of TWC testified that he thought of WealthTV as an “aspirational . . . lifestyles of the rich and famous network.”⁵⁹⁷

297. WealthTV’s own website also is inconsistent with a network targeted to men. Nothing on the website gives any viewer any reason to believe that the network is so

⁵⁹³ TWC Ex. 4; Hearing Tr. 3180:20-3181:12 (Herring).

⁵⁹⁴ Hearing Tr. 3782:18-3788:15 (McGovern).

⁵⁹⁵ Cox Ex. 22. Mr. Herring also sent an e-mail to TWC announcing that it would be setting up two booths at the American Association of Retired Persons (“AARP”) convention “to market WealthTV and ‘The Boomer Show’ during the conference directly to viewers.” Comcast Ex. 20.

⁵⁹⁶ TWC Ex. 11. *See also* TWC Ex. 112 (E-mail from Charles Herring to Julie Simon of TWC explaining that WealthTV’s programming lineup “speaks loudly to a broad audience”); TWC Ex. 113 (E-mail from Charles Herring to John Ghiorzi instructing him to “highlight the broad appeal, luxury fever aspect of WealthTV” when meeting with Julie Simon of TWC).

⁵⁹⁷ TWC Ex. 82, Carter Dir. Test. ¶ 8; Hearing Tr. 4095:7-13 (Carter).

targeted. To the contrary, WealthTV states there that it is a network with “a wide range of programming designed to have a broad appeal.”⁵⁹⁸

298. The WealthTV website also contains a link to a Call Center Sheet provided to MVPD customer service personnel to use in discussing the network with their subscribers. These materials describe WealthTV as having “broad appeal across all demographics.”⁵⁹⁹ Nowhere does WealthTV state that its programming is directed primarily at males ages 25 to 49.⁶⁰⁰ The Call Center Sheet also features descriptions of a number of representative WealthTV programs, called “Programming Highlights,” some of which are male-skewed, some of which are female-skewed, and some of which do not skew toward either gender.⁶⁰¹ Nonetheless, in discussing the “representative” WealthTV programs in his written testimony, Mr. Herring ignores five of the eight shows highlighted in the “Programming Highlights” section of the WealthTV Call Center Sheet.⁶⁰²

299. WealthTV’s press releases are to the same effect. In a January 2004 press release that preceded WealthTV’s launch, WealthTV described itself as “a lifestyle and entertainment network designed to appeal to a broad market[.]”⁶⁰³ Not a word in this press release — or any other — describes the network as having a male skew.⁶⁰⁴

⁵⁹⁸ TWC Ex. 102.

⁵⁹⁹ TWC Ex. 111.

⁶⁰⁰ TWC Ex. 111; Hearing Tr. 3235:11-3236:14 (Herring).

⁶⁰¹ TWC Ex. 111; Hearing Tr. 3237:14-3240:13 (Herring).

⁶⁰² TWC Ex. 111; WTV Ex. 144, Herring Dir. Test. at 20; Hearing Tr. 3243:7-3245:1 (Herring).

⁶⁰³ TWC Ex. 109.

⁶⁰⁴ TWC Ex. 109; Hearing Tr. 3249:1-17 (Herring).

E. WealthTV Has Not Rebutted Defendants’ Evidence Regarding The Lack Of Similarity Between WealthTV And MOJO

300. As noted, TWC’s expert in programming analysis, Michael Egan, independently designed a quantitative and qualitative study, watched substantial amounts of programming and conducted research to support his expert opinion that WealthTV and MOJO are not substantially similar.⁶⁰⁵

301. Although WealthTV attempts to rebut Mr. Egan’s analysis with the testimony of its own expert in programming analysis, Sandra McGovern, it is clear that her opinion is entitled to little or no weight. First, Ms. McGovern did neither an independent quantitative nor empirical analysis to support her opinion. Her testimony made crystal clear that Mr. Herring selected for her programming that he believed to appeal to men, while failing to provide her programming that either appealed to women or both sexes. Ms. McGovern made no effort to ensure the representativeness of the programming provided to her by Mr. Herring.⁶⁰⁶ The testimony adduced at trial showed that it was not at all representative.

302. In her testimony at trial, Ms. McGovern conceded that many of the programs listed on WealthTV’s website were not in the compilation of programming that Mr. Herring personally sent her.⁶⁰⁷ She further confirmed that the shows Mr. Herring did not provide included WealthTV’s female-skewed or gender neutral shows on such topics as fashion (“Chic,” “What To Wear”), etiquette (“Etiquette 101”), travel (“European Getaways,” “The Luxury

⁶⁰⁵ TWC Ex. 85, Egan Dir. Test. ¶ 6; Hearing Tr. 5170:2-5171:2, 5173:7-5175:15 (Egan).

⁶⁰⁶ Hearing Tr. 3814:18-3815:4 (McGovern).

⁶⁰⁷ *Id.* at 3816:15-20 (McGovern); TWC Ex. 102.

Travel Show”), health (“Wealth on Health”) and movie reviews (“At the Movies”).⁶⁰⁸ In fact, she had no familiarity at all with 23 of the 29 featured shows on WealthTV’s website.⁶⁰⁹

303. Ms. McGovern did recognize enough programming, however, to permit her to concede that many of the genres of programming on WealthTV and MOJO were not overlapping. She agreed that WealthTV was family-friendly while MOJO was not.⁶¹⁰ MOJO carried sports and movies, and WealthTV did not.⁶¹¹ Ms. McGovern further acknowledged that WealthTV carried shows on fashion, shopping, certain luxury travel shows, philanthropy, health and Baby Boomers while MOJO offered no comparable shows.⁶¹²

304. Ms. McGovern similarly performed an inadequate review of the similarities between MOJO and INHD programming that was also orchestrated by Mr. Herring. When first retained by WealthTV, Ms. McGovern signed (but did not submit) a sworn declaration dated January 25, 2009 in which she opined that MOJO was not a re-branding of INHD but a launch of a new channel. She included that opinion in her written testimony as well.⁶¹³ But she came to that conclusion without either watching a single episode of MOJO programming or reviewing a programming schedule.⁶¹⁴ Although she did manage to look at a MOJO programming lineup before rendering her February 2009 written report submitted in this

⁶⁰⁸ Hearing Tr. 3816:21-3826:15 (McGovern); TWC Ex. 102.

⁶⁰⁹ Hearing Tr. 3826:16-3827:11 (McGovern); TWC Ex. 102.

⁶¹⁰ Hearing Tr. 3796:19-3799:11 (McGovern).

⁶¹¹ *Id.* at 3799:12-3800:2 (McGovern).

⁶¹² *Id.* at 3800:3-3803:20 (McGovern).

⁶¹³ *Id.* at 3805:4-3807:22 (McGovern).

⁶¹⁴ *Id.* at 3808:1-3809:2 (McGovern).

action, that one-week schedule of programming was also hand-selected for her by Charles Herring. Ms. McGovern had no idea whether this lineup was representative of MOJO's programming and never called Mr. Herring to discuss the matter.⁶¹⁵ Mr. Herring subsequently identified for her a one-week schedule of INHD programming to consider in connection with her testimony.⁶¹⁶

305. Finally, the weight of Ms. McGovern's testimony is undermined by her willingness to offer opinions for which she clearly had no basis. In her original sworn statement dated February 20, 2009, which she confirmed during her March deposition testimony, Ms. McGovern stated that MOJO deliberately copied WealthTV's genres and programming concepts. On the eve of her trial appearance, however, Ms. McGovern deleted the referenced testimony, acknowledging that she did not "know what the intention was of any executives involved to absolutely replicate or copy those programs."⁶¹⁷ Similarly, in her February 20 sworn declaration, Ms. McGovern stated unequivocally that "WealthTV has made an offer for a remedy which I believe to be extremely fair and reasonable by any industry standards."⁶¹⁸ Yet, she had never seen an offer, had no understanding of the price or rates of carriage being offered and assumed erroneously that WealthTV was offering a MFN provision.⁶¹⁹ At trial, she therefore withdrew her opinion on the reasonableness of the proposed remedy, stating that she did not "understand . .

⁶¹⁵ *Id.* at 3809:3-3810:10 (McGovern).

⁶¹⁶ *Id.* at 3810:11-3811:1 (McGovern).

⁶¹⁷ *Id.* at 3715:14-3725:1 (McGovern); WealthTV Ex. 152.

⁶¹⁸ Hearing Tr. 3725:6-22 (McGovern).

⁶¹⁹ *Id.* at 3726:1-3734:6 (McGovern).

. the remedy that’s been offered.”⁶²⁰ Ms. McGovern’s cavalier treatment of her own sworn statements renders her remaining opinions of little weight.

VI. WEALTHTV HAS NOT PROVEN THAT DEFENDANTS’ CONDUCT UNREASONABLY RESTRAINED ITS ABILITY TO COMPETE FAIRLY

306. WealthTV also contends that as a result of Defendants’ carriage decisions, WealthTV has been unable to compete fairly in the marketplace. Once again, the evidence overwhelmingly fails to support this claim.

A. WealthTV Has Grown Consistently Despite Its Lack Of Carriage On Defendants’ Systems

307. While it is typical for “many start-up cable networks . . . to fail to gain *any* agreements with MVPDs,”⁶²¹ the evidence adduced at the hearing shows that WealthTV has grown steadily over the years despite its lack of carriage on Defendants’ systems. WealthTV’s website indicates that WealthTV has obtained carriage from over 80 other MVPDs.⁶²² Mr. Herring confirmed on cross examination that “many startup networks haven’t gotten nearly as much carriage as [WealthTV has] gotten in the five years [since it was] launched.”⁶²³

308. Indeed, WealthTV has continued to sign up new carriage partners over the last several years despite the lack of carriage on each of Defendants’ systems.⁶²⁴ WealthTV’s

⁶²⁰ *Id.* at 3725:12-22 (McGovern); WealthTV Ex. 152.

⁶²¹ TWC Ex. 86, Homonoff Dir. Test. ¶ 11 (emphasis added); *see also* Hearing Tr. 4831:9-4832:10 (Homonoff).

⁶²² BHN Ex. 8, Ordover Expert Report ¶¶ 11, 19; Cox Ex. 44, Ordover Expert Report ¶¶ 11, 19.

⁶²³ Hearing Tr. 3320:7-11 (Herring).

⁶²⁴ *Id.* at 3294:11-16 (Herring) (“Q And you have been expanding your carriage among other cable operators and telcos, notwithstanding the fact that the four defendants in this case have not agreed to carry you. Correct? A Yes”).

MVPD carriage partners include Charter, Verizon FiOS, AT&T U-verse, Qwest, RCN, WideOpen West, and Service Electric.⁶²⁵

309. WealthTV's estimates of its subscriber base show a corresponding and rapid growth in the number of total "subscriber households" receiving WealthTV. WealthTV estimates that as of May 1, 2007, it had approximately [BEGIN HIGHLY CONFIDENTIAL]

[REDACTED]⁶²⁶ [REDACTED]

[REDACTED]⁶²⁷ [REDACTED]

[REDACTED]⁶²⁸ [REDACTED]

[REDACTED]

[REDACTED]⁶²⁹ [END HIGHLY

CONFIDENTIAL] Such rapid growth belies any claim that WealthTV's ability to compete fairly has been unreasonably restrained.

B. WealthTV Has Not Proven That It Needs 20 Million Subscribers To Be Viable And Gain National Advertising

310. Witnesses for WealthTV assert that it is necessary for an emerging network to achieve at least 20 million subscribers in order to become viable.⁶³⁰ In their view, 20 million subscribers is the minimum threshold necessary for a network to secure national

⁶²⁵ TWC Ex. 75.

⁶²⁶ Comcast Ex. 25.

⁶²⁷ *Id.*

⁶²⁸ *Id.*

⁶²⁹ *Id.*

⁶³⁰ WTV Ex. 144, Herring Dir. Test. at 50; WTV Ex. 146, Turner Dir. Test. ¶ 6.

advertising.⁶³¹ Evidence adduced at the hearing, however, fundamentally undermines these claims.

(a) There are viable networks with fewer than 20 million subscribers

311. The record demonstrates that there are networks with fewer than 20 million subscribers that have been successful in securing national advertising. MOJO, for instance, “never exceeded 10 million subscribers.”⁶³² Nevertheless, MOJO secured national advertising. For instance, in 2007, Grey Goose vodka purchased advertising on the MOJO program, “After Hours,” and helped underwrite the costs of producing the programming.⁶³³ MOJO also had successful relationships with United Parcel Service, Dos Equis and Sony.⁶³⁴

312. In addition to MOJO, WealthTV expert witness Gary Turner admitted on cross-examination that The Sportsman Channel was able to sell national advertising with fewer than 20 million viewers:

Q Then, [The Sportsman Channel] in fact ha[s] sold national advertising to sponsor Monday night, Tuesday night, Wednesday night, Thursday night, Saturday night, and Sunday night, correct?

A That is correct.

Q National non-direct advertising for a network with fewer than 20 million viewers, correct?

⁶³¹ WTV Ex. 144, Herring Dir. Test. at 50; Turner Dir. Test. ¶ 6. Mr. Herring also refers to a previous “declaration dated February 21st, 2008, items 2 through 5” as providing reasons why Defendants’ conduct restrains WealthTV’s ability to compete fairly. WTV Ex. 144, Herring Dir. Test. at 50. This declaration, however, was not admitted into evidence in this hearing and thus cannot be considered as evidence in this proceeding.

⁶³² Cox Ex. 84, Asch Dir. Test. ¶ 66.

⁶³³ *Id.* ¶ 76.

⁶³⁴ *Id.* ¶¶ 77-79.

A Again, they have a unique value proposition, because they are nationally-distributed magazines, and the advertisers advertise in the magazines as well as on their television programs.

Q Could you answer my question, sir?

A Yes.⁶³⁵

313. Furthermore, “numerous companies are competing for viewers by pursuing different business models rather than one which simply seeks the highest possible penetration into U.S. multichannel video homes.”⁶³⁶ For instance, niche-oriented channels that have small but loyal audiences, particularly ethnic channels such as those that target Hispanics and other ethnic groups, are experiencing growth in gross advertising revenue well above the anticipated growth for U.S. cable networks as a whole.⁶³⁷ Dish Network has been carrying a variety of programming networks aimed at other ethnic groups for some time and many such networks will be unlikely ever to reach 20 million subscribers.⁶³⁸

(b) Mr. Turner’s testimony is not reliable

314. WealthTV rests its claims regarding the 20 million subscriber threshold primarily on the testimony of its expert advertising witness, Gary Turner. On cross-examination, however, it became apparent that Mr. Turner had no factual basis to support his opinion that an emerging network must achieve at least 20 million subscribers in order to become viable.

315. Mr. Turner testified that “WealthTV, like *all* other emerging networks, needs to meet the 20 million subscriber threshold in order to become a viable national

⁶³⁵ Hearing Tr. 2811:20-2812:13 (Turner).

⁶³⁶ TWC Ex. 86, Homonoff Dir. Test. ¶ 35.

⁶³⁷ *Id.* ¶ 36.

⁶³⁸ *Id.* (“DISH notes that it carries 150 different international channels in 28 different languages, ranging from Urdu to Italian to Vietnamese.”).

advertising source for national general market advertisers.”⁶³⁹ Mr. Turner further testified that his 20 million subscriber theory was the “general consensus in the industry.”⁶⁴⁰ On cross-examination, however, Mr. Turner backed away from these statements, asserting that his putative 20 million subscriber benchmark was merely a “rule of thumb.”⁶⁴¹

316. When questioned further about his basis for the 20 million subscriber benchmark, Mr. Turner admitted that he would not be able identify which cable networks with fewer than 20 million subscribers do or do not have national advertisers.⁶⁴²

317. When presented with TWC Ex. 64, a list of cable networks with estimates of their subscriber numbers prepared by SNL Kagan, Mr. Turner stated that he did not know whether numerous cable networks with fewer than 20 million subscribers (*i.e.*, Palladia, HDNet, NBA TV, Hallmark Movie Channel, Universal HD, Crime and Investigation Network) had any national non-direct response advertising.⁶⁴³ Ultimately, Mr. Turner admitted that he could not tell one way or the other whether any of the other sub-20 million subscriber networks on TWC Ex. 64 did or did not have any national non-direct response advertising.⁶⁴⁴ In other words, Mr. Turner lacks any support for his opinion with regard to the 20 million subscriber threshold.

318. Moreover, Mr. Turner’s testimony overall simply does not represent credible, reliable evidence based on his expertise. Mr. Turner has admitted that his written

⁶³⁹ WTV Ex. 146, Turner Dir. Test. ¶ 7; Hearing Tr. 2798:10-20 (Turner) (emphasis added).

⁶⁴⁰ Hearing Tr. 2723:18-2724:3 (Turner).

⁶⁴¹ *Id.* at 2798:21-2799:1 (Turner).

⁶⁴² Hearing Tr. 2802:8-13 (Turner).

⁶⁴³ *Id.* at 2803:14-2806:10 (Turner).

⁶⁴⁴ *Id.* at 2812:14-20 (Turner).

testimony was based on a draft provided to him by Mr. Herring on or around February 16, only a few days before he executed the document on February 18, 2009.⁶⁴⁵ In fact, together with his wife, Mr. Turner spent no more than approximately five hours working on Mr. Herring's draft before executing it.⁶⁴⁶ All of these reasons taken together demonstrate that Mr. Turner's testimony was not the work of an independent expert, is not reliable and should not be given any weight.

(c) Twenty million subscribers is the wrong benchmark for a predominantly HD channel

319. In addition to the fundamental unreliability of Mr. Turner's testimony, there are significant logical flaws with regard to WealthTV's assertion that it must achieve distribution to 20 million subscribers in order to become viable. First, as Mr. Turner testified, the putative 20 million subscriber benchmark necessarily applies only to SD networks, not to HD networks.⁶⁴⁷ In fact, there are barely 20 million HD subscribers in the entire country.⁶⁴⁸ Thus, for HD networks in the current environment, "the limited number of HD service households means that they only have available to them a relatively small proportion of the total television marketplace."⁶⁴⁹ Consequently, for a network like WealthTV that is marketing itself as an HD

⁶⁴⁵ *Id.* at 2737:1-16 (Turner).

⁶⁴⁶ *Id.* at 2737:17-2738:9 (Turner).

⁶⁴⁷ *Id.* at 2824:21-2825:3 (Turner) ("Q If a network is only carried as an HD network, as HD only, does your 20 million threshold apply to HD only networks? A My testimony was about standard definition networks.").

⁶⁴⁸ TWC Ex. 86, Homonoff Dir. Test. ¶ 34.

⁶⁴⁹ *Id.*

service, the number of HD subscribers — not SD subscribers — is the more pertinent benchmark.⁶⁵⁰

C. Lack Of Carriage By The Defendants Does Not Prevent WealthTV From Securing Tens Of Millions Of Subscribers

320. Nevertheless, the reality is that a network can secure distribution to more than 20 million subscribers without carriage on any or all of the Defendants’ systems, even assuming that 20 million was a relevant benchmark. Mr. Turner estimates the total number of MVPD subscribers in the United States to be approximately 100 million.⁶⁵¹ The four Defendants account for approximately 40-45 percent of those 100 million subscribers, leaving approximately 50 million subscribers.⁶⁵² Thus, WealthTV could have secured distribution to well over 20 million subscribers without securing carriage on any of the four Defendants.

321. For instance, the two DBS providers, DirecTV and Dish Network, represent approximately 32 percent of the total MVPD subscribers throughout the United States.⁶⁵³ DirecTV has approximately 17.5 to 18 million subscribers⁶⁵⁴ and Dish Network has approximately 13.5 million subscribers.⁶⁵⁵ Moreover, both DirecTV and Dish Network are ubiquitous — they are available throughout the country.⁶⁵⁶ A programming network could,

⁶⁵⁰ *Id.*

⁶⁵¹ Hearing Tr. 2722:12-15 (Turner).

⁶⁵² *Id.*

⁶⁵³ Cox Ex. 44, Ordoover Expert Report ¶ 11.

⁶⁵⁴ Hearing Tr. 2791:14-16 (Turner).

⁶⁵⁵ *Id.* at 2791:15-20 (Turner).

⁶⁵⁶ Cox Ex. 44, Ordoover Expert Report ¶ 11 (“The Federal Communications Commission (FCC) recently reported that ‘almost all consumers are able to obtain programming through . . . a cable service and at least two DBS providers.’”).

therefore, achieve distribution to at least 31 million subscribers without carriage on TWC, BHN, Cox or Comcast simply by entering into contracts with the satellite providers DirecTV or Dish Network.⁶⁵⁷ In addition to DirecTV and Dish Network, WealthTV could have secured distribution on numerous MVPDs other than the four Defendants, none of which are affiliated with iN DEMAND or MOJO, including Cablevision, Mediacom, Suddenlink, Cable One, Atlantic Broadband, Armstrong, Knology, Blue Ridge Communications and Broadstripe.⁶⁵⁸

322. WealthTV has offered no credible evidence to show that Defendants' conduct has in any way prevented it from securing carriage to reach the approximately 50 million subscribers served by these other MVPDs. Mr. Turner's allegations of a "follow-the-leader" mentality — in which carriage decisions by the four Defendants control the carriage decisions of other MVPDs⁶⁵⁹ — are outside the scope of his competence to testify and are entitled to no weight.⁶⁶⁰ Indeed, other than the mere assertion of the conclusion, Mr. Turner offered no specific examples of this phenomenon in action. Ms. McGovern's unsupported assertion that a "network foreclosed from reaching the 'eyeballs owned' by larger MVPDs will suffer both from the reduced license fees and from reduced ability to attract subscribers,"⁶⁶¹ fails

⁶⁵⁷ TWC Ex. 86, Homonoff Dir. Test. ¶ 34; *see also* Hearing Tr. 2794:10-14 (Turner) ("Q And one way that you would build substantial coverage would be to get nationwide coverage on [DISH] and DirecTV, correct? A That is correct."), 2797:8-16 ("Q Right. If they had been on DirecTV and on [DISH] across their entire platform, you wouldn't have had a problem, would you? A If they were distributed on their entire platform, no. Q No. Because you would have had at least 31 million subscribers, correct? A That is correct.").

⁶⁵⁸ TWC Ex. 75.

⁶⁵⁹ WTV Ex. 146, Turner Dir. Test. ¶ 8.

⁶⁶⁰ Hearing Tr. 2731:8-2733:6 (McGovern).

⁶⁶¹ WTV Ex. 145, McGovern Dir. Test. ¶ 20.

to address, much less refute, the point that WealthTV could secure distribution to tens of millions of subscribers without carriage on the four Defendants' cable systems. Ms. McGovern does not even attempt to address the significance of large MVPDs such as DirecTV and Dish Network. And neither Mr. Turner nor Ms. McGovern come to grips with the fact that nearly over 80 MVPDs with more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] subscribers have, in fact, entered into agreements with WealthTV notwithstanding the network's failure to gain carriage on Defendants' systems.⁶⁶²

323. Furthermore, the testimony of economist Dr. Janusz Ordover directly rebuts any notion that the conduct of any of the four Defendants impeded WealthTV's ability to compete by discouraging other MVPDs from carrying the network.⁶⁶³ Mr. Ordover testified that there is no theoretical reason that small MVPDs would necessarily follow the programming lead of larger MVPDs, and that it would be a reasonable and potentially effective business strategy for small MVPDs to differentiate by carrying different channels from their key competitors (namely DBS providers and overbuilders) and thereby gain subscribers who value those channels.⁶⁶⁴ Even if the decision of another MVPD to carry or not carry a network influences an MVPD's carriage decision, however, the other MVPD's decision "would be one of many factors, not the sole — or even a major determinative — factor as WealthTV suggests."⁶⁶⁵

324. In today's marketplace, programming networks are not restricted to linear carriage on MVPDs as the only means of reaching viewers. For instance, some programmers are

⁶⁶² See Proposed Findings of Fact, *supra*, at ¶¶ 307-09.

⁶⁶³ BHN Ex. 8, Ordover Expert Report ¶ 17; Cox Ex. 44, Ordover Expert Report ¶ 17.

⁶⁶⁴ BHN Ex. 8, Ordover Expert Report ¶ 19; Cox Ex. 44, Ordover Expert Report ¶ 19.

⁶⁶⁵ BHN Ex. 8, Ordover Expert Report ¶ 20; Cox Ex. 44, Ordover Expert Report ¶ 20.

successfully focusing on VOD distribution rather than full linear carriage.⁶⁶⁶ “A review of various VOD offerings by cable operators, in particular, shows a number of programming services that began or have remained carried on solely a VOD basis And VOD usage is climbing significantly.”⁶⁶⁷ Other smaller programmers have obtained distribution via commercial leased access channels from major MVPDs, while other approaches include the pursuit of distribution on broadcasters’ digital spectrum.⁶⁶⁸ Finally, “with an increasing number of customers watching through their computers and mobile devices, there is a growing opportunity to bypass MVPDs and deliver their content via the web.”⁶⁶⁹

325. In short, WealthTV’s inability to secure carriage on any one of the Defendants’ systems did not prevent it from securing distribution to 20 million subscribers (even assuming that it is a relevant threshold) through affiliation agreements with MVPDs other than the four Defendants. Indeed, “if a programmer chooses to define itself narrowly as only a 24-hour-per-day programming network, and particularly only as a 24-hour-per-day HD network, then it would be choosing to limit its own potential business opportunities in video distribution that others have opted to explore. Distribution of a 24-hour-per-day ad-supported programming network is no longer the only working business model for video content distribution. Accordingly, failure to secure carriage on one or more cable operators for such services will not, in and of itself, prohibit content providers from competing in the marketplace.”⁶⁷⁰

⁶⁶⁶ TWC Ex. 86, Homonoff Dir. Test. ¶ 37.

⁶⁶⁷ *Id.*

⁶⁶⁸ *Id.* ¶ 39.

⁶⁶⁹ *Id.* ¶ 40.

⁶⁷⁰ *Id.*; see also Hearing Tr. 4801:18-4804:9 (Homonoff).

D. There Are No Anti-Competitive Effects Resulting From Decisions By Cox And BHN Not To Carry WealthTV

326. There is no evidence in this case that the decisions of Cox and BHN not to carry WealthTV prevented WealthTV from competing in the marketplace for programming delivered by an MVPD.⁶⁷¹

327. MOJO faced significant competition from programming networks other than WealthTV.⁶⁷²

328. Given the circumstances of the cable programming marketplace, neither Cox nor BHN had an incentive to favor MOJO. The exclusion of WealthTV, assuming it was possible, would not allow Cox and BHN to charge higher prices or realize other supra-competitive benefits from MOJO.⁶⁷³

329. It is very unlikely that the presence or absence of WealthTV would have any effect on MOJO's pricing ability. Consequently, neither Cox nor BHN would have any economic incentive to impair WealthTV's ability to compete.⁶⁷⁴

330. WealthTV does not need to rely on subscribers served by BHN to achieve a reasonable scale of distribution.⁶⁷⁵ BHN serves only 2.5 percent of the universe of households served by MVPDs.⁶⁷⁶ Likewise, WealthTV does not need to rely on Cox to achieve a reasonable

⁶⁷¹ BHN Ex. 8, Ordoover Expert Report ¶ 26; Cox Ex. 44, Ordoover Expert Report ¶ 26.

⁶⁷² BHN Ex. 8, Ordoover Expert Report ¶ 7; Cox Ex. 44, Ordoover Expert Report ¶ 7.

⁶⁷³ BHN Ex. 8, Ordoover Expert Report ¶¶ 23, 24, 25; Cox Ex. 44, Ordoover Expert Report ¶¶ 23, 24, 25.

⁶⁷⁴ BHN Ex. 8, Ordoover Expert Report ¶ 27; Cox Ex. 44, Ordoover Expert Report ¶ 27.

⁶⁷⁵ BHN Ex. 8, Ordoover Expert Report ¶ 9.

⁶⁷⁶ *Id.*

scale of distribution.⁶⁷⁷ Cox serves only five percent of the universe of households served by MVPDs.⁶⁷⁸

331. With respect to WealthTV's ability to be a viable programmer, given their small size in comparison to the total number of available households, as a threshold matter Cox and BHN are close to irrelevant.⁶⁷⁹

332. The media markets served by BHN or Cox are not uniquely attractive to WealthTV in terms of their demographics; they are not "ideal" markets for WealthTV.⁶⁸⁰

333. Moreover, it is possible for WealthTV to reach the residents of media markets served by BHN and those served by Cox through competing providers, both terrestrial and satellite.⁶⁸¹

334. In sum, the decisions of Cox and BHN not to carry WealthTV did not and could not have unreasonably interfered with WealthTV's ability to compete fairly as a programming service.⁶⁸²

VII. WEALTHTV HAS NOT PROVEN THAT ITS PROPOSED REMEDY IS WARRANTED

335. In the event that it is successful on its liability claim, WealthTV seeks an order of carriage providing for (1) immediate, full linear carriage on Defendants' systems to the

⁶⁷⁷ Cox Ex. 44, Ordoover Expert Report ¶ 9.

⁶⁷⁸ *Id.*

⁶⁷⁹ Hearing Tr. 5433:4-7 (Ordoover).

⁶⁸⁰ BHN Ex. 8, Ordoover Expert Report ¶ 10; Cox Ex. 44, Ordoover Expert Report ¶ 10.

⁶⁸¹ *Id.*; Cox Ex. 44, Ordoover Expert Report ¶ 11.

⁶⁸² BHN Ex. 8, Ordoover Expert Report ¶ 30; Cox Ex. 44, Ordoover Expert Report ¶ 30; Hearing Tr. 5381:3-14, 5381:20-53823: 3 (Ordoover).

extent they carried MOJO, (2) a ten-year term, (3) rates beginning at \$.075 per subscriber, (4) no MFN and (5) no drop rights.⁶⁸³ There is no evidence that has been adduced in this case that would require the Presiding Judge to address a remedy. But if remedy is considered, WealthTV has failed to prove why the remedy it proposes should be adopted. To the contrary, the marketplace evidence of the agreements that WealthTV has entered into — which should provide the best evidence on remedy — demonstrate that WealthTV frequently [BEGIN
HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END HIGHLY CONFIDENTIAL]

A. WealthTV’s Request For Immediate, Company-Wide Linear Carriage On The Defendants’ Systems Far Exceeds What WealthTV Has Secured In The Marketplace And What It Has Shown It Is Willing To Accept

336. First, there is not a sufficient evidentiary basis for an order of full linear carriage. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]⁶⁸⁴ [REDACTED]

[REDACTED]⁶⁸⁵ [REDACTED]

[REDACTED]⁶⁸⁶

⁶⁸³ WealthTV Ex. 144, Herring Dir. Test. at 52, 54-55; WTV Ex. 23.

⁶⁸⁴ Hearing Tr. 3025:9-3029:22, 3260:12-3267:12 (Herring); TWC Ex. 10 (WealthTV Agreement with Insight); *see also* TWC Ex. 18 (WealthTV Agreement with Charter).

⁶⁸⁵ Hearing Tr. 3030:1-4 (Herring).

⁶⁸⁶ *Id.* at 3271:2-22 (Herring).

337. [REDACTED]

[REDACTED]⁶⁸⁷ [REDACTED]

[REDACTED]⁶⁸⁸ [END

HIGHLY CONFIDENTIAL]

338. Moreover, WealthTV's dealings with Defendants plainly demonstrate its willingness to accept a hunting license. WealthTV offered a hunting license for linear and VOD services to TWC in the September 6, 2007 term sheet signed and dated by Charles Herring.⁶⁸⁹ Similarly, WealthTV claims it proposed a hunting license-type agreement to Cox in 2004,⁶⁹⁰ and WealthTV discussed the possibility of a hunting license with Comcast in April 2008.⁶⁹¹

339. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[REDACTED] **[END HIGHLY**

CONFIDENTIAL] expressed willingness to work with Defendants on those same terms establishes that WealthTV is seeking a remedy in this case that is more favorable than **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[REDACTED] **[END HIGHLY CONFIDENTIAL]**

B. A Ten-year Term For Carriage Is Not Warranted

340. **[BEGIN HIGHLY CONFIDENTIAL]** [REDACTED]

[REDACTED]

⁶⁸⁷ See TWC Exs. 3, 61; *see also* Hearing Tr. 3297:12-3301:20 (Herring).

⁶⁸⁸ Hearing Tr. 3299:15-3301:3 (Herring).

⁶⁸⁹ See TWC Ex. 48; *see also* TWC Ex. 83, Goldberg Dir. Test. ¶ 21.

⁶⁹⁰ See Cox Ex. 78; Hearing Tr. 3407:7-3410:8 (Herring).

⁶⁹¹ Hearing Tr. 3617:11-3619:18 (Herring).

[REDACTED]

⁶⁹² [END HIGHLY CONFIDENTIAL]

341. WealthTV's negotiations with some Defendants reflect that WealthTV would be agreeable to a term of less than ten years. For example, in its negotiations with TWC in 2007, WealthTV was prepared to offer a five-year term.⁶⁹³ WealthTV offered Cox a term of approximately four-and-a-half years.⁶⁹⁴

342. Any term longer than five years would be commercially unreasonable. As TWC executive Melinda Witmer testified, TWC now limits its agreements to three to five years because technology changes too fast to justify a longer agreement.⁶⁹⁵ Moreover, given that mandatory carriage is an extraordinary remedy with First Amendment constraints, and that WealthTV only claims a violation of Section 616 occurred once INHD became known as MOJO, any order of mandatory carriage should not exceed the 18 months that the Defendants actually carried the channel as MOJO.

C. The Rates Sought By WealthTV Are Not Warranted

343. In his written testimony, Charles Herring proposes a rate card for carriage of WealthTV that he believes reflects "fair market value."⁶⁹⁶ The rate card proposed by WealthTV is based on a fee that increases from \$0.075 per digital basic subscriber to \$0.175 per

⁶⁹² See TWC Ex. 3 at TWC 3-1.

⁶⁹³ See TWC Ex. 48 at TWC 48-3 (affiliation agreement approved by WealthTV and proposed to TWC, providing for a five-year term); Hearing Tr. 4189:11-4190:3 (Goldberg).

⁶⁹⁴ Hearing Tr. 3400:17-3405:13 (Herring); *see also* Cox Ex. 78.

⁶⁹⁵ Hearing Tr. 3924:3-10 (Witmer).

⁶⁹⁶ WTV Ex. 144, Herring Dir. Test. at 57-59.

digital basic subscriber throughout WealthTV's proposed term.⁶⁹⁷ This proposed rate is not based upon any empirical, market analysis, and is justified by Mr. Herring as reasonable because it is about one-half of the purported MOJO rate.

344. Yet, although WealthTV seeks carriage on terms similar to those provided to MOJO,⁶⁹⁸ Mr. Herring is not aware of the price charged for carriage of MOJO.⁶⁹⁹ The evidence shows that in fact the owners of iN DEMAND did not pay for MOJO on a per digital subscriber basis, but rather on a per HD subscriber basis.⁷⁰⁰ WealthTV has not proffered a remedial rate based upon HD subscribers. Without more, Mr. Herring's proposal is entitled to little weight.

D. If The Presiding Judge Were To Recommend Mandatory Carriage, The Terms Of That Carriage Warrant An MFN provision

345. An MFN clause in an affiliate agreement provides that the contracting programming network will offer the contracting MVPD with carriage terms and conditions at least as favorable as those that the network offers to any other MVPD.⁷⁰¹

346. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

⁶⁹⁷ See WTV Ex. 23 at 5.

⁶⁹⁸ *Herring Broad., Inc. v. Time Warner Cable, Inc.*, Carriage Agreement Compl., at 28.

⁶⁹⁹ See, e.g., WTV Ex. 144, Herring Dir. Test. at 34.

⁷⁰⁰ Hearing Tr. 4020:20-4021:17 (Witmer).

⁷⁰¹ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
[REDACTED] [END HIGHLY CONFIDENTIAL]

[REDACTED]⁷⁰² [REDACTED]
 [REDACTED]⁷⁰³ [END HIGHLY
 CONFIDENTIAL]

347. WealthTV offered an MFN in its proposed term sheet agreement with TWC.⁷⁰⁴

348. Moreover, WealthTV’s expert, Ms. McGovern, testified that an MFN is appropriate and would be expected by large MVPDs; she was surprised that WealthTV’s proposed remedy did not include an MFN provision.⁷⁰⁵

E. If The Presiding Judge Were To Recommend Mandatory Carriage, The Terms Of That Carriage Warrant Drop Rights

349. Drop rights are the right to cease carriage of WealthTV at an MVPD’s election.⁷⁰⁶ Drop rights are standard in carriage agreements between the Defendants and programming networks. They also benefit both contracting parties, because an MVPD is more likely to agree to carry a new or fledgling network if it knows it has the right to drop such a network should it not prove to offer the anticipated appeal to subscribers.⁷⁰⁷

⁷⁰² [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]
 [REDACTED] [END HIGHLY
 CONFIDENTIAL]

⁷⁰³ Hearing Tr. 3285:14-21 (Herring).

⁷⁰⁴ See TWC Ex. 48 at TWC 48-3 (affiliation agreement approved by WealthTV and proposed by TWC, providing for a “net effective rate” MFN); *see also* TWC Ex. 48 at TWC 48-4; Hearing Tr. 3361:10-15, 3365:15-3367:16, 3370:5-15. (Herring).

⁷⁰⁵ Hearing Tr. 3727:20-3728:6, 3844:12-3847:16 (McGovern).

⁷⁰⁶ TWC Ex. 83, Goldberg Dir. Test. ¶ 15.

⁷⁰⁷ *Id.* ¶ 16.

350. [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁷⁰⁸ [END HIGHLY CONFIDENTIAL] Similarly, as recently as August 2007, WealthTV was prepared to offer Cablevision full drop rights.⁷⁰⁹ In addition, WealthTV offered full drop rights to TWC as recently as in the fall of 2007.⁷¹⁰

PROPOSED CONCLUSIONS OF LAW

I. INTRODUCTION

1. In its carriage complaint, WealthTV claims that TWC, BHN, Cox and Comcast each discriminated against it on the basis of their affiliation with the programming network MOJO. The Commission's Media Bureau designated for hearing before the Presiding Judge two questions: (a) whether each Defendant discriminated against WealthTV in favor of its own programming in violation of Section 76.1301(c) of the Commission's rules with the effect

⁷⁰⁸ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]

⁷⁰⁹ See TWC Ex. 40; *see also* Hearing Tr. 3285:14-19 (Herring).

⁷¹⁰ TWC Ex. 83, Goldberg Dir. Test. ¶ 21; Hearing Tr. 3363:18-22, 3370:5-15 (Herring).

of unreasonably restraining WealthTV's ability to compete fairly;⁷¹¹ and (b) if so, whether (and on what terms) mandatory carriage would be necessary to remedy such violation.⁷¹²

2. Because of its potential to undermine well-protected First Amendment rights, Section 76.1301(c) must be construed and applied narrowly. A finding of discrimination cannot be grounded in the mere disparate treatment of two networks, but rather must reflect impermissible discriminatory motivation or intent by the Defendants. Thus, in order to establish liability under Section 76.1301(c), WealthTV must demonstrate discrimination either by direct evidence or through competent circumstantial evidence that would permit the Presiding Judge to draw an inference of discrimination, such as by demonstrating that Defendants' professed reasons for denying carriage were pretextual. The challenged conduct, moreover, must unfairly restrain WealthTV's ability to compete in the marketplace.

3. WealthTV has failed to carry its burden of proof. As described in detail in the Proposed Findings of Fact, every Defendant witness has denied that any consideration of WealthTV was impacted by MOJO, and iN DEMAND's programming executive confirmed that WealthTV had nothing to do with the development of INHD or MOJO.

4. WealthTV has failed to establish any basis for an inference of discriminatory intent. Each Defendant has proven its good faith business justification for its

⁷¹¹ 47 C.F.R. § 76.1301(c) (2009). Section 76.1301(c) implements Section 616 of the Communications Act of 1934, as amended (the "Communications Act"). 47 U.S.C. § 536 (2009). Congress added Section 616 to the Communications Act by the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

⁷¹² *Herring Broad., Inc., d/b/a WealthTV v. Time Warner Cable Inc., et al.*, 23 FCC Rcd 14787, 14842-44, Mem. Op. and Hr'g Desig. Order (Med. Bur. Nov. 10, 2008) ("HDO"); *see also Herring Broadcasting, Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, MB Docket No. 08-214, Mem. Op. and Order, FCC 08M-47, at ¶ 8 (ALJ rel. Nov. 20, 2008) ("Nov. 20 Mem. Op. and Order") (modifying the issues designated for hearing).

course of conduct vis a vis WealthTV, justifications that are both acknowledged by WealthTV witnesses and mirror the business reasons underlying the comparable decisions of non-Defendant MVPDs that had no interest in MOJO. Nor can any inference be drawn from Defendants' disparate treatment of substantially similar networks.⁷¹³ The overwhelming evidence, confirmed by Defendants' programming expert, manifests that WealthTV and MOJO were entirely different both respect to their programming and their target audiences.

5. The factual record also compels the legal conclusion that WealthTV was not unfairly restrained by any Defendant in its ability to compete. WealthTV has consistently grown throughout the relevant time period even without carriage by Defendants, and has available to it a potential universe of distributors that serve more subscribers than are currently served by Defendants. None of the challenged conduct has had an actionable competitive affect on WealthTV.

II. IN THIS *DE NOVO* PROCEEDING, WEALTHTV BEARS THE BURDEN OF PROOF ON EVERY ELEMENT OF ITS CLAIMS AGAINST EACH DEFENDANT

6. The Presiding Judge has made clear that with respect to its complaint against each of the four Defendants, WealthTV has “both the burden of proceeding with the introduction of evidence *and the burden of proof*” with regard to each and every element of its claim of discrimination and remedy.⁷¹⁴ Moreover, the Presiding Judge will review on a *de novo*

⁷¹³ Defendants do not concede that any differing treatment of networks, even if somehow considered to be substantially similar, constitutes any violation of Section 616 absent any discrimination on the basis of affiliation.

⁷¹⁴ *Herring Broad., Inc. d/b/a WealthTV v. Time Warner Cable Inc., et al.*, MB Docket No. 08-214, Order, FCC 08M-44, at 2 (ALJ rel. Oct. 23, 2008) (emphasis added); *see also* Nov. 20 Mem. Op. and Order at ¶ 6 (WealthTV must “present, and prove” its case), *modified by erratum* (ALJ rel. Nov. 21, 2008).

basis the evidence adduced at the hearing; “the ‘facts’ and ‘conclusions’ recited in the *HDO* will not be considered as binding on the Presiding Judge.”⁷¹⁵

7. There are two essential elements of a claim under Section 76.1301(c). First, any alleged discrimination in the selection, terms or conditions of carriage must be “on the basis of affiliation or nonaffiliation.”⁷¹⁶ Second, the effect of such discrimination must be “to unreasonably restrain the ability of the complainant to compete fairly.”⁷¹⁷

8. The discrimination prong of a claim under Section 76.1301(c) also necessarily presents the question of whether there has been differential treatment of two similarly situated entities. The Supreme Court has held that “any notion of discrimination assumes a comparison of substantially similar entities” and that “there is a threshold question whether the companies are indeed similarly situated.”⁷¹⁸ In other words, there is no discrimination under Section 76.1301(c) if an MVPD treats dissimilar programming networks dissimilarly.

⁷¹⁵ Nov. 20 Mem. Op. and Order at ¶ 6; *see also id.* (“[A] recommended decision will be made on the specified issues based *solely* on the evidence compiled during the course of the hearing, and not on the basis of how those questions were addressed in the *HDO*.”) (emphasis in original); Hearing Tr. at 97:17-22 (Nov. 25, 2008) (Sippel, C.J.) (“I’m citing to Judge Steinberg now, but . . . for me, that’s the rule of the case, unless I’m directed to do otherwise by a higher authority. And it’s a de novo case. That’s the difference between no hearing and a hearing.”).

⁷¹⁶ 47 U.S.C. § 536(a)(3) (2009); 47 C.F.R. § 76.1301(c) (2009).

⁷¹⁷ *Id.* *See also Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage*, MB 07-42, 22 FCC Rcd 11222, 11227 ¶ 14 (2007) (“Currently, our rules provide that any complainant alleging a violation of Section 616(a)(3)’s prohibition on discrimination must demonstrate that the alleged discrimination is ‘on the basis of affiliation or nonaffiliation’ of a vendor, and that ‘the effect of the conduct that prompts the complaint is to unreasonably restrain the ability of the complainant to compete fairly.’”).

⁷¹⁸ *General Motors Corp. v. Tracy*, 519 U.S. 278, 298–99 (1997) (footnote omitted) (emphasis added). The Supreme Court has held that a “similarly situated” threshold requirement applies in discrimination cases arising in contexts as varied as the Commerce Clause, the

9. WealthTV failed to meet its burden of proof with regard to each of these elements.

III. SECTION 76.1301(c) OF THE COMMISSION’S RULES MUST BE CONSTRUED AND APPLIED NARROWLY

A. The Program Carriage Rules Must Be Interpreted Consistent With The Intent of Congress

10. Section 76.1301(c) must be construed in light of the purposes of the 1992 Cable Act.⁷¹⁹ In that regard, both Congress and the Commission have recognized that the public interest would not be served by an overly broad application of program carriage regulation that failed to “preserve[] the ability of the affected parties to engage in legitimate, aggressive negotiations” or “preclud[e] legitimate business practices common to a competitive marketplace.”⁷²⁰ To that end, Congress expressly admonished the Commission to “rely on the marketplace to the maximum extent feasible.”⁷²¹

11. Congress did not intend to turn MVPDs into common carriers or to otherwise deny vertically integrated MVPDs editorial discretion enjoyed by non-vertically integrated MVPDs over programming decisions. Consequently, Congress directed the

Equal Protection Clause, employment discrimination law and occupational safety law. *See, e.g., Kraft Gen. Foods, Inc. v. Iowa Dep’t of Rev. and Fin.*, 505 U.S. 71, 81 n.23 (1992); *Allegheny Pittsburgh Coal Co. v. County Comm’n of Webster Co., West Virginia*, 488 U.S. 336, 345-46 (1989); *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 258 (1981); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 19 (1980).

⁷¹⁹ *See* 1992 Cable Act (codified at scattered sections of 47 U.S.C.)

⁷²⁰ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 2642, 2643, 2648-49 ¶¶ 1, 14, 15 (1993); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 9 FCC Rcd 4415 ¶ 27 (1994).

⁷²¹ 1992 Cable Act § 2(b)(2).

Commission to distinguish the concept of “discrimination” in the program carriage context “from how that term is used in connection with actions by common carriers subject to Title II of the Communications Act.”⁷²²

The Committee does not intend...for the Commission to create new standards for conduct in determining discrimination under this section. An extensive body of law exists addressing discrimination in normal business practices, and the Committee intends the Commission to be guided by these precedents.⁷²³

12. The extensive body of law governing normal business practices that Congress intended the Commission to follow in assessing complaints alleging unlawful discrimination under Section 76.1301(c) includes the United States Supreme Court’s decision in *McDonnell Douglas* and its progeny.⁷²⁴ Although *McDonnell Douglas* addressed allegations of racial discrimination under the Civil Rights Act of 1964, courts have relied upon it since 1973 as establishing the legal standard for evaluating claims of discrimination arising under statutes

⁷²² H.R. REP. NO. 102-628, at 25 (1992) (“House Report”).

⁷²³ *Id.*

⁷²⁴ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000). The Media Bureau’s determination not to apply *McDonnell Douglas* to program carriage disputes in a separate action involving Time Warner Cable should not govern here. *TCR Sports Broadcasting Holding v. Time Warner Cable Inc.*, 23 FCC Rcd 15783, 15793 (Med. Bur. 2008) (“*Time Warner*”) (*appellate review pending*). The legislative history quoted above is an express indication that Congress intended cases such as these to be governed by the “extensive body of law ... addressing discrimination in normal business practices” – *i.e.*, by *McDonnell Douglas* and the thousands of cases elaborating upon and applying that decision. In any event, the Media Bureau’s *Time Warner* decision is pending Commission review and the final decision in this case will also be reached by the Commission, which is in no way bound by the Media Bureau’s *Time Warner* decision.

which, like Section 616, require a plaintiff to prove discrimination “*on the basis of*” (or “*because of*”) a particular factor.⁷²⁵

13. Under this precedent, statutes prohibiting discrimination “*on the basis of*” (or “*because of*”) a particular factor require a plaintiff to prove not only that it endured treatment different from that afforded to other similarly situated persons or entities, but also that the factor identified by the statute “*actually motivated* the [challenged] decision”⁷²⁶ and had a “*determinative influence* on the outcome.”⁷²⁷ In such cases, “[p]roof of discriminatory motive is critical.”⁷²⁸

14. Absent direct evidence of discriminatory intent, a complainant may prevail only if it can show both (a) the defendant treated similarly situated entities dissimilarly, and (b) the defendant’s non-discriminatory rationale for such disparate treatment was a mere pretext for discrimination.⁷²⁹ Thus, it is well-established that where a defendant has articulated a valid rationale for disparate treatment of similarly situated entities, the plaintiff can prevail only if it “prove[s] by a preponderance of the evidence that the legitimate reasons offered by the defendant

⁷²⁵ See, e.g., *Reeves*, 530 U.S. at 141 (Age Discrimination in Employment Act); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927 (8th Cir. 1993) (Fair Housing Act); *Price v. S-B Power Tool*, 75 F.3d 362, 364 (8th Cir. 1996) (Americans With Disabilities Act); *Gross v. U.S. Small Bus. Admin.*, 669 F. Supp. 50, 52 (N.D.N.Y. 1987) (Equal Credit Opportunity Act).

⁷²⁶ *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (emphasis added); see also *Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2366 (2008).

⁷²⁷ *Hazen*, 507 U.S. at 610 (emphasis added); see also *Reeves*, 530 U.S. at 141.

⁷²⁸ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

⁷²⁹ *McDonnell Douglas*, 411 U.S. at 804; *Young v. Dillon Cos., Inc.*, 468 F.3d 1243, 1250 (10th Cir. 2006).

were not its true reasons, but were a pretext for discrimination.”⁷³⁰ The plaintiff bears the burden of proof that each of the defendant’s stated reasons was not honestly held⁷³¹ and is so implausible that it reasonably is nothing more than a pretext for discrimination.⁷³² Mere allegations that the defendant’s stated reasons are pretext are insufficient.⁷³³

B. The Program Carriage Rules Must Be Construed Narrowly To Protect Cable Operators’ First Amendment Rights

15. The Supreme Court has made clear that “[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.”⁷³⁴ Moreover, this protection extends to the “exercise [of] editorial discretion over which stations or programs to include in [the cable operator’s] repertoire.”⁷³⁵ Thus, the Defendants have a constitutional right not to be forced by the

⁷³⁰ *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also McDonnell Douglas*, 411 U.S. at 804.

⁷³¹ *See, e.g., Woodard v. Fanboy, L.L.C.*, 298 F.3d 1261, 1265 (11th Cir. 2002) (“A plaintiff trying to show pretext based on a defendant’s dishonest belief of the grounds the defendant gave for his decision does not succeed by presenting evidence that the defendant was mistaken about the facts upon which he based his alleged non-discriminatory decision. Instead, a plaintiff must present evidence from which a reasonable jury could find that the defendant did not honestly believe the facts upon which he allegedly based his non-discriminatory decision.”); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (“In judging whether [defendant’s] proffered justifications were ‘false,’ it is not important whether they were *objectively* false . . . Rather, courts ‘only require that an employer honestly believed its reason for its actions, even if its reason is foolish or trivial or even baseless.’”).

⁷³² *See, e.g., Young*, 468 F.3d at 1250.

⁷³³ *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 220 (5th Cir. 2001) (To prove that a defendant’s stated reasons for disparate treatment were pretextual, the plaintiff “must put forward evidence rebutting each of the nondiscriminatory reasons” articulated); *Clay v. Holy Cross Hosp.*, 253 F.3d 1000, 1007 (7th Cir. 2001).

⁷³⁴ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994) (“*Turner I*”).

⁷³⁵ *Id.* (quoting *Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986)).

Commission to distribute content “which reason tells them should not be published.”⁷³⁶ Indeed, “[t]he right to speak and the right to refrain from speaking are complementary components”⁷³⁷ of the same liberty and, thus, governmental requirements mandating speech carriage must be subject to a “measure of heightened First Amendment scrutiny.”⁷³⁸ These Constitutional considerations dictate that the Presiding Judge, and ultimately the Commission, must apply the prohibition against affiliation-based discrimination sparingly and with due deference to evidence that each Defendant’s decisions regarding the carriage of WealthTV was informed by and based on a good-faith exercise of editorial judgment independent of considerations of affiliation or non-affiliation.

16. Furthermore, even if the Presiding Judge were to conclude that the Defendants unlawfully discriminated against WealthTV, the First Amendment establishes a very high threshold that must be met before the government can require the Defendants to carry particular content. Mandatory carriage of particular programming may be appropriate under the First Amendment only if it is “narrowly tailored to serve a compelling state interest”⁷³⁹ and there is no “less restrictive alternative” available.⁷⁴⁰ As applied to the facts established in this case,

⁷³⁶ *Miami Herald Publ’g Co. v Tornillo*, 418 U.S. 241, 256 (1974).

⁷³⁷ *See, e.g., Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

⁷³⁸ *Turner I*, 512 U.S. at 641.

⁷³⁹ *Hill v. Colo.*, 530 U.S. 703, 748 (2000); *see also United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

⁷⁴⁰ *See, e.g., Playboy Entm’t Group*, 529 U.S. at 813.

mandated carriage of WealthTV on non-marketplace terms and conditions proposed by WealthTV would not be appropriate both as a matter of statutory and constitutional law.⁷⁴¹

IV. UNDER ANY STANDARD, WEALTHTV HAS FAILED TO MEET ITS BURDEN OF PROOF

A. WealthTV Failed To Provide Any Direct Evidence That Any Of The Four Defendants Discriminated On The Basis Of Affiliation

17. Although WealthTV obtained ample discovery from Defendants, it failed to present any direct evidence, either through documents, or written or oral testimony, that any Defendant's respective course of conduct with respect to WealthTV was based on considerations of its affiliation with MOJO or its non-affiliation with WealthTV. Each of the Defendants, by contrast, presented the testimony of the key programming executives who were personally involved in discussions with WealthTV regarding potential carriage of that network and in the consideration of whether to extend carriage to WealthTV.⁷⁴² These executives affirmed under oath that neither their companies' affiliation with MOJO nor WealthTV's lack of affiliation with any Defendant had anything to do with the decisions each individual company made regarding WealthTV.⁷⁴³ The iN DEMAND executive responsible for developing INHD and MOJO testified that he had not even heard of WealthTV.⁷⁴⁴ This evidence is entirely un rebutted.

⁷⁴¹ Defendants reserve the right not only to bring an "as applied" challenge to the constitutionality of Section 616(a)(5), which authorizes the Commission to order carriage where "appropriate" as a remedy for a violation of the program carriage rules, but also to more generally challenge the constitutionality of Section 616.

⁷⁴² See Proposed Findings of Fact, *supra*, at ¶¶ 50-52, 57-65, 76-96, 139-59, 202-16.

⁷⁴³ See *id.*, *supra*, at ¶¶ 36-38, 69-72, 113-16, 217-19.

⁷⁴⁴ See Cox Ex. 84, Asch Dir. Test. ¶¶ 40-43; Hearing Tr. 4404:16-4405:20 (Asch).

B. WealthTV Failed To Establish An Inference Of Discrimination Through Circumstantial Evidence

18. The circumstantial evidence WealthTV adduced at trial failed to establish an inference of unlawful discrimination under Section 76.1301(c).

(a) WealthTV failed to establish that MOJO and WealthTV were similarly situated

19. WealthTV failed to prove a necessary predicate for its claim, namely, the fundamental requirement that MOJO and WealthTV are similarly situated programming networks.⁷⁴⁵ Defendants conclusively established through fact and expert evidence that the two networks programmed contrasting genres, had a very different look and feel and targeted different demographics.⁷⁴⁶

20. WealthTV attempted to establish the similarity of WealthTV and MOJO by introducing self-selected snippets of its programming purportedly reflecting that WealthTV and MOJO sought to appeal to the same audience demographic.⁷⁴⁷ But even Mr. Herring admitted on cross-examination that these hand-picked screen shots were not representative of the overall look and feel of the programs offered on WealthTV.⁷⁴⁸ And WealthTV's programming expert, Ms. Sandra McGovern, acknowledged that she had not seen 23 of the 29 programs highlighted on the WealthTV website, including the female-skewed and gender-neutral shows that Mr. Herring did not bring to her attention.⁷⁴⁹ At no point, moreover, did WealthTV even attempt to offer as evidence a representative picture of the programming on its network.

⁷⁴⁵ See Proposed Findings of Fact, *supra*, at Section V.

⁷⁴⁶ *Id.*

⁷⁴⁷ See *id.*, *supra*, at ¶¶ 272, 281.

⁷⁴⁸ See *id.*, *supra*, at ¶ 281.

⁷⁴⁹ See *id.*, *supra*, at ¶ 302.

21. By contrast, TWC’s expert witness on programming analysis, Mr. Michael Egan, performed a comprehensive quantitative and qualitative comparative study of the programming on WealthTV and MOJO in support of his opinion and testimony that the two networks were not substantially similar.⁷⁵⁰ Through his application of a programming genre analysis, Mr. Egan concluded that there was little overlap in the programming genres featured on WealthTV and MOJO, respectively,⁷⁵¹ and that WealthTV more closely resembled several other networks, including Fine Living, Food Network, and American Life TV.⁷⁵² Mr. Egan also compared the overall “look and feel” of WealthTV and MOJO, concluding that they were nothing alike.⁷⁵³

22. Finally, the Defendants presented voluminous evidence that WealthTV did not focus on the same audience demographic that MOJO targeted (men ages 25 to 49).⁷⁵⁴ WealthTV’s own affiliation agreements, presentation materials, marketing materials, and websites all show that WealthTV has always been designed to appeal broadly across age and gender demographics to all men and women interested in how wealth is achieved and enjoyed.⁷⁵⁵

⁷⁵⁰ *See id., supra*, at ¶ 273.

⁷⁵¹ *See id., supra*, at ¶¶ 274-76, 278.

⁷⁵² *See id., supra*, at ¶ 277.

⁷⁵³ *See id., supra*, at ¶¶ 279-82.

⁷⁵⁴ *See id., supra*, at ¶¶ 284-99.

⁷⁵⁵ *Id.*

(b) Defendants have rebutted any inference that their respective business decisions were pretextual

23. Each Defendant also presented un rebutted evidence demonstrating that its consideration of whether to provide carriage to WealthTV was based on non-discriminatory, good-faith, editorial and business judgments.⁷⁵⁶ Each Defendant’s carriage decision relating to WealthTV was based on legitimate business considerations such as the un compelling nature of WealthTV’s programming,⁷⁵⁷ bandwidth management,⁷⁵⁸ WealthTV’s unrealistic carriage expectations and price structure,⁷⁵⁹ the lack of evidence of subscriber demand for or interest in WealthTV’s programming,⁷⁶⁰ and concerns that WealthTV’s management team had no experience producing quality programming and lacked third-party financial backing.⁷⁶¹ These are precisely the same types of business reasons the evidence shows that non-Defendant MVPDs — all unaffiliated with MOJO — have relied upon in denying carriage to WealthTV on their systems.⁷⁶² This evidence was more than sufficient to shift the burden to WealthTV to establish under *McDonnell Douglas* that Defendants’ respective rationales were not honestly believed and so implausible as to be nothing more than a pretext for discrimination.

24. WealthTV failed to make such a showing. In fact, testimony from WealthTV’s principal, Mr. Charles Herring, as well as from industry expert witnesses and

⁷⁵⁶ See *id.*, *supra*, at ¶¶ 38-53, 56-65, 76-111, 124-28, 136-63, 193-215.

⁷⁵⁷ See *id.*, *supra*, at ¶¶ 49-53, 57, 77-78, 102-05, 142-48, 207.

⁷⁵⁸ See *id.*, *supra*, at ¶¶ 44-46, 50, 106-07, 156.

⁷⁵⁹ See *id.*, *supra*, at ¶¶ 47-48, 57, 108-09, 157-59.

⁷⁶⁰ See *id.*, *supra*, at ¶¶ 51-52, 57, 149-53, 201-04.

⁷⁶¹ See *id.*, *supra*, at ¶¶ 42, 110-11, 154-55.

⁷⁶² See *id.*, *supra*, at ¶¶ 220-29.

witnesses from the Defendants themselves, confirmed the reasonableness of the Defendants’ respective business judgments.⁷⁶³

C. WealthTV Failed To Establish That A Lack of Carriage On Defendants’ Systems Unreasonably Restrained Its Ability To Compete Fairly

25. To prevail against any one of the Defendants, WealthTV must also establish that the Defendant’s conduct “*unreasonably* restrain[ed]” its ability “to compete fairly.”⁷⁶⁴ WealthTV argues that each Defendant’s conduct had the effect of unreasonably restraining WealthTV’s ability to compete fairly by “making it more difficult for WealthTV to reach the critical mass of subscribers.”⁷⁶⁵ Yet, the simple fact that WealthTV’s competitive position was more challenging than it might otherwise have been had any one of the Defendants carried its programming is not sufficient to prove that any Defendant’s conduct unreasonably restrained WealthTV’s ability to compete fairly.

26. The words “unreasonably” and “fairly” in the statute necessarily require meaningful limitations on the competitive harm prong of Section 616 of the Act and Section 76.1301(c) of the Commission’s rules.⁷⁶⁶ Otherwise, all refusals of carriage necessarily would

⁷⁶³ See *id.*, *supra*, at ¶¶ 220, 222-24, 229.

⁷⁶⁴ 47 U.S.C. § 536(a)(3) (2009) (emphasis added); 47 C.F.R. § 76.1301(c) (2009) (emphasis added); see also House Report at 43.

⁷⁶⁵ WealthTV Pre-Trial Brief at 20.

⁷⁶⁶ The Commission’s implementation of the 1996 Telecommunications Act is notable with regard to this point. Under Section 251(d)(1) of the Communications Act, the Commission was required to prescribe rules for unbundling telecommunications network elements when failure to provide a particular network element would “impair” a competitive carrier’s ability to provide service. 47 U.S.C. § 251(d)(2). The Commission originally interpreted this “impairment” standard as requiring unbundling for elements without which a competitive carrier would face any increase in cost or decrease in service quality. The Supreme Court set aside this interpretation finding, *inter alia*, that “the Commission’s assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element . . . causes the failure to provide that element to [‘impair’] the entrant’s ability to furnish its desired

automatically satisfy this prong of the statute, rendering it meaningless. The legislative history of Section 616 of the Communications Act bolsters this conclusion by revealing that Congress had in mind an antitrust type of analysis for this particular language.⁷⁶⁷ Under such an analysis, a programmer is only entitled to relief where the cable company’s conduct actually presented a restraint that was “unreasonably restrictive of competitive conditions.”⁷⁶⁸

27. The evidence WealthTV submitted to support its claim of competitive harm, however, fails under any standard. WealthTV presented no documentary evidence to

services, is simply not in accord with [the ordinary and fair meaning of those terms.] An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been ‘impaired’ in its ability to amass earnings, but has not *ipso facto* been ‘impaired . . . in its ability to provide the services it seeks to offer’” *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 (1999) (emphasis in original). The Court held that the Commission was required to give some substance to the statutory terms, rather than considering *any* cost increase to be an impairment. *Id.* at 392. It said the FCC must “apply *some* limiting standard, rationally related to the goals of the Act.” *Id.* at 388. (emphasis added) Here, the Commission must likewise give some substance to the statutory terms “unreasonably” and “fairly” by requiring proof of significant, material impediments to provide service.

⁷⁶⁷ See House Report at 41, 42 (calling for “traditional antitrust analysis” to be used in evaluating market effects of mergers and integration.). In this regard, antitrust claims are often analyzed under a “rule of reason,” under which the trier-of-fact must decide “whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.” *State Oil Co. v. Barkat U. Khan and Khan & Assocs., Inc.*, 522 U.S. 3, 10 (1997) (citing *Arizona v. Maricopa County Med. Soc.*, 457 U.S. 332, 343 & n. 13 (1982)); see also *Bd. of Trade of the City of Chicago, et al. v. United States*, 246 U.S. 231, 238 (1918) (“[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. *The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.*”) (emphasis added)).

⁷⁶⁸ *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911) (construing “unreasonable restraint of trade” language in Section 1 of the Sherman Act).

support its claim and its testimonial evidence was fundamentally unreliable and unconvincing. Moreover, WealthTV's evidence was directly rebutted by Defendants' expert and fact witnesses.

28. WealthTV's theory of competitive harm rests exclusively on the testimony of Charles Herring and Gary Turner that an emerging network needs to secure distribution to at least 20 million subscribers in order to attract the national advertisers that will make a network financially viable over the long term,⁷⁶⁹ and on Ms. McGovern's testimony that lack of carriage on a given system will harm a network by limiting its license fees and advertising revenue.⁷⁷⁰ The testimony of Mr. Herring, Mr. Turner, and Ms. McGovern is fundamentally unsupported and unreliable on these points, and should be given no weight.⁷⁷¹

29. For all the reasons discussed above, WealthTV has failed to establish any causal link between any of the Defendants' conduct and WealthTV's ability to compete in the marketplace. MVPDs other than Defendants serve some 50 million subscribers available to WealthTV from MVPDs other than the Defendants.⁷⁷² Ms. McGovern's testimony ignores this fact and the fact that a programming network can secure distribution to tens of millions of subscribers (with the concurrent license fees and advertising revenue) without carriage by any of the Defendants.⁷⁷³

30. The testimony of Dr. Janusz Ordoover confirms that WealthTV could have achieved distribution to tens of millions of subscribers simply by entering into contracts with the

⁷⁶⁹ See Proposed Findings of Fact, *supra*, at ¶ 310.

⁷⁷⁰ See *id.*, *supra*, at ¶ 322.

⁷⁷¹ See *id.*, *supra*, at ¶¶ 310-19.

⁷⁷² See *id.*, *supra*, at ¶¶ 320-22.

⁷⁷³ *Id.*

satellite providers DirecTV and Dish Network or by accessing any number of alternative methods of distribution.⁷⁷⁴

31. In addition, and entirely independent of the other reasons why WealthTV's proof of causation fails, Dr. Ordoover testified that there is no basis to conclude that lack of carriage to the relatively small numbers of BHN (2.5 million) or Cox (5.4 million) subscribers unreasonably restrained WealthTV's ability to compete fairly for viewers or advertisers, or that BHN or Cox had any incentive or ability to disadvantage WealthTV in the marketplace.

32. Finally, evidence adduced at the hearing shows that WealthTV has in fact grown steadily without carriage on any of the four Defendants' systems.⁷⁷⁵ Such rapid growth demonstrates that WealthTV's ability to compete fairly has not been unreasonably restrained.

V. WEALTHTV HAS FAILED TO ESTABLISH THAT ITS PROPOSED MANDATORY CARRIAGE REMEDY IS NECESSARY OR APPROPRIATE

33. As discussed above, the First Amendment establishes a very high threshold before the government can mandate carriage of particular content. Even if the Presiding Judge finds that WealthTV has sustained its burden of proof on the issue of liability, WealthTV has failed to carry its burden of proof with respect to its proposed mandatory carriage remedy. WealthTV has offered no evidence that it would be appropriate for the Presiding Judge to order the Defendants to grant WealthTV carriage on the Defendants' systems around the

⁷⁷⁴ See *id.*, *supra*, at ¶ 323.

⁷⁷⁵ See *id.*, *supra*, at ¶¶ 307-09.

country at unilaterally-dictated rates and terms that give WealthTV more than what it has sought and achieved from other MVPDs in the marketplace.⁷⁷⁶

34. At most (should liability be found), the remedy should reflect terms that WealthTV has actually accepted in the marketplace, consistent with agreements commonly reached by new program services, as established by the testimony. As detailed in the Proposed Findings of Fact, those terms include a hunting license provision setting the terms for, but not mandating, carriage by the Defendants' cable systems, a limited term of no more than eighteen months, unlimited drop and retiering rights, an MFN provision, and the option to carry WealthTV in SD, HD, or both.⁷⁷⁷ [BEGIN HIGHLY CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].⁷⁷⁸ [END HIGHLY CONFIDENTIAL] There is no compelling state interest under the First Amendment and governing law that mandates any greater remedy here.

35. In addition, WealthTV would have to be subject to the same unfavorable terms on which MOJO was carried by the Defendants, including the right to distribute WealthTV only to HD subscribers and the right of the Defendants' systems to preempt the MOJO programming at their discretion.

⁷⁷⁶ See *id.*, *supra*, at Section VII.

⁷⁷⁷ See *id.*, *supra*, at ¶¶ 336-350.

⁷⁷⁸ *Id.*

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Joint Proposed Findings of Fact and Conclusions of Law be adopted by the Presiding Judge in support of a recommended decision denying the relief sought by WealthTV in this carriage complaint proceeding.

Respectfully submitted,

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I, Micah M. Caldwell, hereby certify that, on this 2nd day of June, 2009, copies of the foregoing “Defendant’s Joint Proposed Findings of Fact” were sent via e-mail, to the following:

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